IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In the matter of:	)	
	)	
GARLOCK SEALING TECHNOLOGIES, LLC, et al.,	)	No. 10-31607
	)	Jointly Administered
	)	Charlotte, NC
Debtors.	)	May 12, 2011, 9:31 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GEORGE R. HODGES
UNITED STATES BANKRUPTCY JUDGE

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EXHIBITS

NO.	DESCRIPTION	ID	ADM
GST 154	Presentation by Mr. Worf	91	184
GST 155	Garlock Sealing Technologies LLC Mesothelioma Claim Questionnaire	91	184
ACC 103	Asbestos Committee's Questionnaire	118	184

(CALL TO ORDER)

THE COURT: Good morning.

COUNSEL: Good morning.

THE COURT: Have a seat. We are here for Garlock, and why don't we get everybody's voices on the machine. So why don't we start with Mr. Guy and work across the room.

MR. GUY: Good morning, Your Honor. Jonathan Guy for the FCR and Mr. Grier is here in the courtroom.

THE COURT: All right.

MR. SWETT: Good morning, Your Honor. Ted Swett and Leslie Kelleher, along with Tom Moon, for the Official Committee of Asbestos Personal Injury Claimants.

MR. CASSADA: Good morning, Your Honor. Garland Cassada. I am here today with Jon Krisko and Rich Worf. We represent the debtors.

MR. CLODFELTER: Good morning, Your Honor. Dan Clodfelter and Hillary Crabtree, Moore & Van Allen, for Coltec Industries.

MR. MILLER: Good morning, Your Honor. Jack Miller and Rick Rayburn of Rayburn, Cooper & Durham on behalf of the debtors.

MS. FLETCHER: Deborah Fletcher for the unsecured creditors committee.

THE COURT: Okay. We have a number of items on the agenda, so we will proceed however you all want to go.

MR. CASSADA: Thank you, Your Honor. Let me sort of summarize what's before the court today. I think we have a very ambitious agenda, given that we only have today. We have agreed that the hearing can adjourn – I think there is a time period by which Mr. Swett has to make a flight, 4:30 or so.

MR. SWETT: Yes. Thank you very much.

MR. CASSADA: Yes. I am not confident that we will get through everything on the agenda, but we have a proposed method of proceeding that we think will cover things that we view as being more on the critical path.

First, Your Honor, we have a status conference that the court scheduled over six months ago on the status of the case today at the end of the preliminary six-month period. In connection with that status conference, Your Honor, we propose to – I will make a brief statement. We will report on the status of the discovery. We will report, if the court is interested, on the status of settlement discussions, but we suggest that any such report should be off the record in chambers. And then we will talk about our ideas for a scheduling order to proceed from this point on and understanding that the court may want to defer actually ruling on a scheduling order until it hears other matters that are before the court today.

Your Honor, in connection with the status conference, the order entered on December 9 stated that the court would

further consider certain aspects of the debtors' bar date motion and the committee's motion for management or scheduling order and, in connection with that, the committee may have specific things that we want the court to consider.

We do think it would be appropriate at this point for the court to consider and enter an order on the debtors' request to approve Rust Consulting as claims agent, both for asbestos claims and then we would also move to appoint Rust Consulting as agent for proofs of claim, non-asbestos proofs of claim.

Inasmuch as we are closing in on finalizing the personal injury questionnaire, we need to be able to serve that and get responses in, and we believe, if we can get Rust promptly appointed, that we will be able to serve that questionnaire most expeditiously.

COURTROOM DEPUTY: We forgot to call in the conference.

THE COURT: We have to call in the conference.

MR. CASSADA: Okay. I will pause.

(Connecting telephonically to the conference.)

THE COURT: Okay. We will proceed.

MR. CASSADA: Yes, sir. On the point of further consideration of certain aspects of the case administration motions that were before the court last fall, we have asked the court to proceed with the appointment of Rust Consulting, and we have also filed an amendment to our bar date motion, which

gives the court an alternative for a very simple proof of claim requirement, and we will talk about that. We won't belabor the bases for that. We understand that the court has heard a lot about that, but we will ask the court to consider that and to enter a ruling on that motion.

The debtors have moved to extend the exclusive periods to propose and solicit acceptance of a plan, and the committee has opposed that and wants the exclusive periods to be terminated, and we will ask the court to hear that after we consider these issues respecting the status conference.

Finally, Your Honor, we have the matter of completing the personal injury questionnaire. We have a brief presentation on that. And then we have on the table the claimants motion for past claimants' discovery, which has been fully briefed and is ready for presentation.

Like I said, that's a very ambitious agenda. I doubt we get through all of it but I hope we can at least get through the completion of the personal injury questionnaire and, if not, perhaps we can pick a date in the next week or two to get that done so that we can have that served within the next thirty days or so.

Your Honor, just briefly I will talk about the status of the case and then we will proceed to give reports on the various tasks that the court directed the parties to engage in during the six-month period.

The six-month preliminary discovery period has ended. The purpose was to obtain discovery regarding claims and estimation for plan formulation purposes and, in part, to permit meaningful negotiations about a consensual plan.

As you will learn, the debtors and their affiliates have produced a wealth of information at great effort and expense. The debtors so far have received nothing that they have requested, and we understand that the court has been very patient in hearing the parties' respective positions on that discovery, but we also understand that it is the court's plan to extend the discovery period to permit reasonable discovery to continue and thereafter to permit meaningful negotiations to occur once the parties have better information in hand.

For that reason, the court said that it was not overly concerned about the pace of discovery in February, and we accordingly haven't been at that point – or since that point, at least, haven't been overly concerned about that.

The court also had indicated in February that, to avoid prejudice to the debtors, that it anticipated a further extension of the exclusive period to coincide with the further discovery, the extension of the discovery period. And given that our exclusive periods have been consumed by the initial six-month discovery period and that we have been proceeding as directed by the court there, we believe this is a fair approach and we support it.

The committee wants to terminate exclusivity, and we are going to argue about that. We will move to present our motion to extend. They will get a chance to present their view, but we believe that, if the court adopts the committee's view, it will change the course of the case and be unfair to the debtors. Again, whose exclusive period has been devoted to the preliminary discovery period and the matters the court asked us to focus on. We believe that the committee sold its approach to this case, which we argued departed from the Bankruptcy Code, as a means of reaching an expedited settlement.

The court put off a decision on a bar date for filing proofs of claim and now, before the debtor obtains any information about the identity and bases for mesothelioma claims against the estate, the committee wants to abort the process it suggested and initiate a confirmation battle.

We support sticking with the court's plan as announced in late February, but the committee has announced it is not apparently in the mood for negotiating and wants to pursue creditors' rights under the plan.

It appears more likely that, even if we proceed pursuant to the court's plan as outlined in the December 9 order, that we may have a contested confirmation battle. We believe strongly, Your Honor, that that cannot happen without requiring asbestos claimants to comply with the requirements of

the code, too, and to assert their claims against the estate if they are going to do so, and that's why we have renewed our request to set a bar date.

I will make a brief presentation on that motion, and we will ask the court to either set a bar date, which we don't think would be as much of an issue now as it was before because the court is already requiring mesothelioma claimants to submit personal injury questionnaires. So we will ask the court to either enter the bar date or enter a final order on disposition of our motion, at least clarifying whether there will be a bar date for filing claims before the exclusive periods expire and/or before any estimation trial is held.

I want to briefly, Your Honor, go over a schedule that we believe would be workable between now and the end of an extended discovery period. We filed a status conference statement late yesterday, and I don't know if the court –

THE COURT: I didn't see that.

MR. CASSADA: – has had a chance to read it, but we filed it. It's docket number 1330.

THE COURT: Have you got an extra copy? Oh, here we go. Okay.

MR. CASSADA: And on page six, Your Honor, we outline there our proposal for scheduling of matters from now until the end of the extension that we asked for with respect to the exclusive periods.

First, Your Honor, we would request that the court immediately appoint Rust Consulting as claims agent and then enter the following scheduling order:

First, on or before Thursday, June 12, the personal injury questionnaire shall be served on counsel of record for all plaintiffs in personal injury actions pending against the debtor by mesothelioma claimants as of June 5, 2010, which is the petition date. There is a typo in our motion. We say 2011. With directions that completed personal injury questionnaires must be filed with the claims agent no later than Monday, September 12, 2011. That would be a three-month period.

We have not had a chance to discuss that with the committee and we are certainly interested in its views about what a fair response time should be, but that struck us as a reasonable amount of time.

If the court agrees that it should set a bar date for proofs of claim, then we ask that the court have that bar date coincide with the personal injury questionnaire dates and that notice of a bar date shall be served on or before Thursday, June 12, 2011, requiring holders of asbestos claims to file the official form ten proof of claim with the claims agent no later than Monday, September 12, 2011, provided, however, that completed personal injury questionnaires shall qualify as proofs of claim for persons alleging mesothelioma.

Under our renewed bar date, we have simplified it greatly, Your Honor, by requiring form ten and also limiting it to persons who have cases pending as of the petition date or who have actually had lawyers identify them in Rule 2019 statements as clients they represent who purport or allege to have claims against the estate. So that simplifies greatly – we have simplified greatly both the content of the proof of claim form and the means of service. It can simply be served on the law firms who have appeared in cases against Garlock as representing these persons.

Your Honor, we would also request that on or before Friday, July 29, 2011, requests for estimation of asbestos claims must be filed, and these requests would state the bases and purposes for any requested estimation. And then on or before Wednesday, August 31, objections to timely motions for estimation of claims must be filed.

So that way, Your Honor, we believe that we would initiate a process that would be very useful to the parties in understanding exactly what is going to be estimated and what the purposes for that estimation will be under the Bankruptcy Code. And those are certainly points that would benefit the debtor today as we have embarked on the discovery but with no clear purpose in mind other than the language formulation that is for purposes of formulating a plan.

On September 15, Your Honor, we would hold a hearing,

and I picked that date because that's a Thursday and the practice has been to have hearings on every other Thursday during the month, and I believe that falls within the sequence. The court would choose a mediator to facilitate negotiations regarding a consensual Chapter 11 plan and order that mediation statements be provided to such mediator within ten days of appointment and mediation commenced no later than Monday, October 10.

And then, Your Honor, we would propose that the debtor would file its proposed plan and disclosure statement on or before Monday, October 31. And, finally, discovery would continue until the court would have a second status conference on Thursday, November 17, on which date the court would conduct a status conference, hearing motions and objections related to estimation, enter an order with respect to the request for estimation and schedule that. And also enter any appropriate scheduling order as it relates to the plan and the disclosure statement filed by the debtor.

And finally, Your Honor, pursuant to the debtors' request, we would ask the court to extend the exclusive proposal period through and including November 28, which would run just after the status conference and the end of the preliminary discovery period and the solicitation period through and including January 26th, 2012.

So, Your Honor, that is our view of a sensible way for

the case to proceed.

Now, Your Honor, I want to shift and provide information to the court regarding the status of settlement discussions and discovery. I don't know whether the court is interested in hearing about settlement discussions. We view it as improper, both with the rules and with our agreements with parties regarding what would be said about what happened in settlement discussions to go on the record on that. We are happy at this point, if the court wants to know more about what's happened in settlement discussions, to go off the record and in chambers and discuss that.

On the other hand, if the court doesn't believe that's necessary or there are objections, then we are fine with focusing on other matters.

THE COURT: It is probably not necessary right now. Maybe we can do that at some point later in the day or whenever if you all want to. I don't plan to get involved in negotiations or know much about what's going on.

MR. SWETT: Your Honor, I think we can report in open court just the objective facts of what has taken place without getting into the contents of the communications. If we were to get into the contents of the communications, I would be at some disadvantage because I was not a participant. The only person for the committee who was a participant is one of the co-chairs and he, of course, is not here.

THE COURT: I mean, I don't want to know the content anyhow. I don't think that would be appropriate.

MR. CASSADA: I will have to say, to be fair to Mr. Swett, that we don't agree, based on our knowledge of settlement discussions, with the statements and his papers regarding what the status is, but I am happy not to get into that.

So we should focus now, I believe, on discovery, and I think the court knows well what the status of the debtors' request for discovery is. In fact, we have focused so far on getting fundamental information in two areas, and one has been focusing on present claimants who might assert claims against the estate. I think these are people who might file proofs of claim if they were required to do so.

We have asked for the personal injury questionnaire to gather information about those claimants. The court is obviously well-informed about the status of the personal injury questionnaire.

We have also focused our discovery on past claimants and particulars of cases that have been settled by the debtor during the last decade. The reason we have done that is because of the proposition in this case that those settlements should be used to determine and value the judge's liability – the court's – the debtors' liability for the present claims and also for future claims. And obviously it's our right under the

code and under the rules to object to that and to demonstrate to the court that those settlements have no relevance to the debtors' liability and, in fact, that those settlements – if settlements are to be a measure, that those settlements are not a fair measure because they were temporarily inflated by a transfer of liability that happened when the insulation defendants and other defendants with high-dose asbestos products filed for bankruptcy and were removed from the compensation system and now are coming back.

So we have diligently sought discovery in that area, as well. We have motions pending on that. Those motions include the motion that's scheduled today, a limited motion for past claimants' discovery, and the motion for trust discovery which we will schedule in turn as soon as the court has ruled on our attempts to get information from other sources.

As far as discovery that has been served on the debtors, Your Honor, and this is discovery that has actually been served on both the debtors and their affiliates, there have been three different sets of discovery. There has been estimation related discovery; there has been insurance related discovery; and then there has been discovery regarding prepetition transactions between the debtors and their affiliates. And this is discovery that was served both by the committee and by the futures rep, although the futures rep may have been, I believe, the only party that served discovery

asking about insurance information.

I will ask Mr. Krisko to report about estimation discovery. He has taken charge of that. I believe that the insurance discovery has been responded to and the prepetition transaction discovery, as well, has been responded to. Much of that response for the prepetition transactions comes from the debtors' affiliates, and Mr. Clodfelter will report to the court on that discovery.

So at this point I will turn it over to Mr. Krisko.

MR. KRISKO: Yes, Your Honor. As Mr. Cassada summarized, the debtors have received requests in three different categories, and principally I will talk about estimation discovery and what the debtors have done and where we stand on the production of documents in response to that discovery.

To-date, the debtors have gathered, reviewed and produced more than a hundred thousand documents responsive to the estimation discovery request propounded by the committee and the future claims representative. As part of an agreement on the timing of discovery, the debtors agreed to commit to substantially complete the production of documents by May 23, a week from Monday, and to at this hearing come and report to the court and to the other parties whether the debtors would be unable to produce any documents by that deadline.

During this process, the debtors have produced

documents using document production software to try to make it easier on the parties to review the documents. They have been produced in electronic format. They have been produced in text searchable format to try to permit their review in a fashion that is most efficient for the parties.

Additionally, the debtors have provided information that they may object to the admission of, namely the use of settlement agreements and that sort of thing, settlement amounts, but nonetheless the debtors have provided, in order to avoid discovery disruptions and to try to encourage the process to go along.

The discovery effort, as it pertains to estimation, has been virtually the focus of almost my entire time for the past couple of months. They have also been the focus of personnel at Garrison Litigation Management, one of the debtors. They have been searching for, identifying and providing documents to our offices for our review.

In addition, some of the documents that the committee and the future claims representative have requested have only been available through lawyers that may have represented Garlock in the past and so, where it was not unduly burdensome to do so, the debtors went out to those lawyers and asked them to collect documents, send them in for our review and production to the committee and the FCR.

I guess the main point of that is to underscore that,

with this number of people involved in this discovery process, it does take time, and I do believe that the debtors have worked very energetically to try to get this process complete.

But returning to the agreement that the debtors made with the committee and the FCR concerning the time of discovery, the debtors report that they do expect to substantially complete the production of documents by May 23. Then there are a couple of exceptions to that, which I will briefly detail. The first of which is the fact that the final production of the debtors is expected to be substantial. And in my experience in this case and others, to gather, organize and produce in the electronic format that I described with text searchable documents that make it ready to review, occasionally when that production is finally prepared, there might be some technical defects because the software writes it to a DVD and it takes several hours and could sometimes require a day or two delay. If that circumstance arises, and I don't expect it to arise, I will contact the committee. I will contact the future claims representative and advise them of that event but the point being that all of the documents will have been gathered, reviewed and ready for production. If any delay occurs, it will only be because of some sort of technical detail that we cannot control.

There is one other exception to that and that is that the debtors have attempted to locate and identify documents

that may have been in the custody of former employees, and we have not fully completed that process of seeing whether their former employees had documents, whether those documents are responsive and reviewing those documents. We don't expect that, if we do identify those documents, they will be many in number, but that process is going to continue and, if any further documents are identified from former employees that may exist within the possession of the debtors, we will promptly provide them to the committee and the FCR.

That completes my report unless the court has any questions.

THE COURT: Thank you.

MR. CASSADA: Your Honor, that completes our report on the status conference. We set forth our proposed schedule and, again, believe that it would be appropriate for the court to consider that after it has considered other issues before it today.

One thing we would like to get on the table and resolved, unless there is some objection to it, is we would like to ask the court and we would like the committee and the futures rep to identify whether they have any objections to us going ahead and entering an order appointing Rust Consulting as asbestos claims agent and as general claims agent.

Rust Consulting would, if appointed today or within the week, would be able to undertake immediate work on getting

the personal injury questionnaire in a form that would permit claimants to respond electronically or to prepare to send that form out to claimants.

We don't think that is a very complicated request. You heard from Rust Consulting here, I believe it was during October when we started the case administration hearings. So it might be helpful to know whether there is any objection to the debtors going ahead and beginning that process and getting Rust Consulting to the task of preparing to work with the questionnaire and to send out notice of the bar date for unsecured, non-asbestos proofs of claim.

THE COURT: Okay.

MR. GUY: Your Honor, the court has indicated before that you will not second-guess the debtors' request on professionals. So I am assuming the same position would apply here.

With regard to Rust Consulting, our concern with Rust Consulting is the same concern we had before. In the *Grace* case, the costs incurred were very significant, and we had asked previously for a budget. I think the court had said no on another professional.

So on this issue, we would just reiterate that we would like the debtors to keep track of the costs and we will be getting to the cost overall in the case later.

Thank you, Your Honor.

MR. SWETT: Your Honor, the ruling on the questionnaire contemplates that, as an option, claimants may submit their responses on a Rust-devised system. So there is good reason to allow them to be engaged at this point. And as Mr. Cassada has also pointed out, there is a need for a non-asbestos bar date and I suppose they plan to make that motion and they will need Rust to handle whatever responses there are to that. So we have no objections to that scope.

THE COURT: Okay.

MR. KRISKO: Your Honor, if I can just address Mr. Swett's point. We actually have already had a motion with hearing on the non-asbestos bar date. I think that Your Honor ordered that there should be one.

I believe what we were contemplating was – there was a technical question, sort of a chicken and egg question with the court's clerk who said we can only have one claims register. And so what the debtors have been doing is we have not sent out the notice of a bar date because we didn't know – we were questioning whether that claims register would be with the court or whether it would be with Rust.

At this point, the debtors have determined that, notwithstanding the results of the asbestos bar date, we need to go ahead and get and set the non-asbestos bar date and, even though Rust would presumably be slightly more expensive to hold that, we need to move forward and that's the best path that we

could see to just move forward on that issue and put it to bed.

THE COURT: All right. Well, we will approve Rust for those purposes and whatever else we assign them to do.

MR. CASSADA: Your Honor, we would propose at this point to move to the issue of the exclusive periods because we think, again, that's on a critical path and that will inform what the court does on the scheduling order, and then we will talk briefly about the bar date after the court hopefully could indicate where it believes we are on the exclusive periods since you have heard the parties' presentations on that.

THE COURT: All right. Is that all right with the rest of you?

(No response.)

THE COURT: Okay. We will proceed that way then.

MR. MILLER: Thank you, Your Honor. Your Honor, Jack Miller on behalf of the debtors.

Your Honor may have noticed that you have heard very little from me, or Mr. Rayburn, or any of our cohorts over the last six months. That's particularly unusual when Mr. Rayburn is in the courtroom. He usually has at least something to say.

You know, the reason for that is the last six or eight months I have been listening to a lot of information from Mr. Cassada and Mr. Swett that is on a subject that I know very little about. I told Mr. Cassada he has forgotten more about asbestos litigation than I will ever know, and the same is true

with Mr. Swett and Mr. Guy clearly.

But, you know, the reason is what this case has been about during the last six to eight months is the various parties staking out their positions on what information the debtors ought to be entitled to in order to make their case on what the debtors' asbestos liability is.

Mr. Cassada has argued that we think that the liability is going to be less - we will be able to show that the liability is less than what the ACC and the FCR - we think the ACC and the FCR's experts will say that it is and we need certain information in order to make that case and Mr. Swett, and to a lesser extent Mr. Guy, have fervently disagreed with that and the court has heard us out on those issues.

But all of that, we think, has been with the eye towards both parties becoming fully informed about whatever information the debtors can get, the debtors making their case to the other side and both parties engaging in negotiations to try to get to a consensual plan if we can.

Unfortunately where we sit today is the debtors have none of the information that we have asked for so far after six months of discovery disputes. When we were before Your Honor on February 17 on the first hearing on the debtors' second motion to extend the exclusive periods, I am assuming that the court was operating under two assumptions. First, that the debtors will get discovery responses in time to analyze those

responses, have the debtors' expert prepare some sort of draft report, present that to the ACC and the FCR, negotiate over plan treatment based on all parties' full knowledge of their estimation trial risk, for lack of a better term, agree or don't agree and move towards either contested or consensual confirmation within the debtors' exclusive periods. That has been the debtors' aim and the debtors have acted with as much speed as they can in getting our discovery requests teed up and heard before Your Honor, trying to meet that time line.

The second assumption was that the ACC would remain open to continuing negotiations and it appears now, based on the papers that the ACC filed on Monday night, that they have determined that they don't want to negotiate, and they are sort of ratcheting up the pressure of the debtors by actually moving to terminate exclusivity and not just deny extension but they have asked to terminate the debtors' solicitation period in order for the ACC, and presumably then the FCR, to move forward with their own plan.

Now, the debtors certainly remain hopeful that estimation discovery disputes will get put to rest in the near-term and we will have a realistic opportunity to negotiate a consensual plan that can be achieved in the next six months, but the debtors at this point have to recognize, based on where we are in the discovery process, first that it is unlikely really to get to an estimation trial within the debtors'

exclusive periods, and that is an assumption that we were not operating under two months ago.

And, secondly, the debtors have to realize the practical reality that the ACC said that they are not interested in negotiating at this point.

And so the debtors at this point have to sort of take a step back and assess their options for formulating a plan that they can potentially get confirmed over the ACC's constituency's objection, if necessary, since at this point it appears that we are. And which, secondly, doesn't require an estimation trial before confirmation because that appears to be where we may be, as well, and to do all of that within the debtors' exclusive periods which, at the latest, only run six months from now in terms of filing.

Now, the debtors are not without options here, we believe. We have indicated from the beginning of the case that the debtors may very well not file and pursue a 524(g) plan if we can't get to an agreement with the committee and the FCR.

So we think that - and the debtors have some ideas that we are now developing, given sort of where we are in the case, on what such a plan might look like. But at this point we have spent the last six months working on discovery issues, estimation discovery and trying to proceed down the path that the court and the ACC and the FCR sort of advocated.

With that, Your Honor, you know, the Code clearly

contemplates that the debtor have an unqualified – and the case law states that the debtor have an unqualified opportunity to present and confirm a plan. And as we sit here today, the debtors have really had no realistic opportunity to file and proceed with a plan of its own in the exclusive periods because the exclusive periods have really been consumed with going down a different track in hopes and effort to get to a consensual plan.

Cause, we believe, for an extension of the exclusivity exists under these circumstances to permit the debtor to first continue its efforts towards finishing up with discovery and potentially in hopes that the information that's learned through that discovery will lead the parties back to the negotiating table but, secondly, giving the debtors an opportunity to formulate a confirmable plan and try to get that confirmed before the expiration of its exclusive periods in the event that negotiations end up failing.

And as we are here today, we are in the very unusual situation, for me at least, of not having any bar dates established and there are some practical hurdles the debtor is going to have to overcome if they are going to be able to present a plan that meets the 1129 requirements. For example, at the hearing on November 19, the court heard Mr. Clodfelter make an argument that, without proofs of claim, there is no way to determine whether the best interest of creditors test is met

under 1129(a)(7) such that the debtors could ever cram a plan down over equity's objection, and the debtors are going to have to take that argument and walk a line between equity's argument and the practical reality that at this point we don't have a bar date for asbestos or non-asbestos claims and try to address that point creatively if the court is inclined not to set a bar date for asbestos claims.

Your Honor, we talked a little bit earlier about the fact that we don't have a non-asbestos claims bar date set yet, although we are going to do that with all due speed and hopefully in the next three months or so we will be able to get all of those claims in but, while we have a pretty good idea of what is out there in terms of unsecured claims, we need to have those claims in so that we know, for classification purposes, where claims need to be classified and, secondly, so that we don't have any surprises that impact the feasibility analysis.

Finally, the debtors haven't yet retained a financial advisor to provide the feasibility and liquidation analyses that we are going to have to have in connection with the disclosure statement, and the reason for that has just been to try to keep the cases as streamlined and efficient as possible and not go off on two different tracks unless and until it absolutely became necessary.

Your Honor, these are the very sort of complexities that the debtors would submit would argue in favor of an

extension and meet the large and complex case test under the case law.

I would just like to make a side note, Your Honor. I am not going to spend any time walking today through the various different factors under the case law. I think our previous brief set those out. We talked about them in the last hearing, and what I am trying to do today is just focus on sort of bringing the court up from where we were on the 17th to where we are today, although I will be happy to talk about those if the court wants to hear any more on those.

Your Honor, really what the debtors are asking for here is just a fair shot to use the code's contemplated exclusivity opportunity, and what the ACC appears to argue is that this stalemate apparently in negotiations is cause to actually terminate exclusivity.

First off, Your Honor, I want to note that it is the ACC's burden to show that cause exists for termination of exclusivity, and we don't believe that the ACC has shown that. The debtors are certainly disappointed to know that the ACC is not interested at this point in negotiating, but the ACC's unilateral determination not to negotiate is not cause to terminate exclusivity.

The *Fountain Power Boat* case, which I believe I cited in our paper that we filed yesterday, which hopefully Your Honor saw, pretty clearly states that stalemated negotiations

with one creditor constituency does not meet the test for cause to terminate exclusivity. And, in fact, that case says that to hold otherwise would permit litigious creditors to manufacture cause to justify shortening the exclusive period.

Likewise, none of the major obstacles to successful negotiation – that's a quote that appears in several of the cases that talk about where there is cause to terminate the debtor's current exclusive periods – none of those exist here. The primary ones that the case law talks about is gross mismanagement of the debtors. There is no evidence of that here. And also acrimonious feuding between the debtor's principals. That's the debtor's management itself, and we don't have any evidence of that here either.

The *Fountain Power Boat* case is one in which the court talks about those major obstacles to successful reorganization.

Your Honor, the bottom line, I think, is that these cases have enough complexity as they currently stand without terminating exclusivity at this point or denying the debtors' request for an extension to open the case up to competing plan proposals.

Your Honor, we think that the debtors have laid out a realistic time line for trying to bring these cases to a conclusion, and we think that that time line fits well within the debtors' requested exclusivity extension.

We simply believe that it is premature at this point,

until the debtors are able to file a plan, for the creditor constituencies to have an opportunity to file a competing plan. We need to wait and see what that plan says and reserve everyone's rights to move to terminate exclusivity based on where we are down the road a little bit in the cases.

Your Honor, for the reasons stated both in our papers and today and at the February 17th hearing, we would ask the court to extend the debtors' exclusive periods for filing, first off, through November 28th and for solicitation through January 26, 2012.

Thank you, Your Honor.

THE COURT: All right.

MR. SWETT: Good morning, Your Honor. Trevor Swett for the committee.

Your Honor, our request to the court is to allow the current extension of the exclusive proposal period to lapse on May 31st. It is apparent and has been for some time that the debtors do not intend to file a plan within this existing extension. That, in turn, makes the extended solicitation period, which presently runs through August 1st, a dead letter. It means nothing if the plan proposal period expires on May 31st and is not further extended.

So we think that events should take their course to May 31st. The debtor will have enjoyed two extensions and will have made no attempt to show, let alone indeed show, that they

can present the plan within that period and, instead, they have contrived a schedule that takes them to the very end of what is virtually the maximum extension, not quite but almost, and they would propose the plan only at that very end which would, of course, imply a very substantial period going forward from there to a confirmation proceeding.

To us, that is an unacceptable pace given the clarity that has emerged in what the issues, the real issues in the case are in these last many months of debate. First about how to administer the case and then about the scope of discovery appropriate for aggregate estimation.

I should say at the outset that the debtors misconstrue the committee's position with respect to negotiations. They characterize the position in a fashion that may lend traction to their argument for an extension but happens to be incorrect.

We have not said we would refuse to negotiate. We have acknowledged the fact that, on the present state of play, the distance between the parties, as elucidated by useful, constructive and informative negotiations, is simply too great to expect anything to emerge from it by way of a consensual plan until events force the issues and force the parties to narrow the issues and to narrow the gap between them and their respective evaluations of what is the appropriate outcome. This is just a statement of reality.

In fact, it's surprising in a sense to hear the debtors say they are disappointed that the committee has unilaterally decided not to negotiate when their own exclusivity papers say they are not in a position to have meaningful negotiations until they get their discovery.

So they are sort of putting us in a Catch-22 position. The fact of the matter is on both sides of this case we have very senior people, very, very accomplished negotiators out front in what has been a candid and constructive exchange and, if there is reason for one side or the other to pick up the phone and renew that discussion, I can assure you that the presence or absence of a further extension of exclusivity will not stand in the way.

Our goal from the beginning of the case has been to get to confirmation with a consensual plan as soon as reasonably possible, and that remains our goal. Our judgment, based upon a lot of experience and an evaluation at the most senior level on our committee of the respective positions staked out by the debtors and the committee's delegate, the co-chair who has been in direct dialogue with Mr. Magee for EnPro and with other senior representatives of Garlock, is that now the parties need to work on narrowing the issue. There needs to be confrontation and rulings on the key issues in the case and that means that much as in normal civil litigation where nothing concentrates the mind so much as a firm trial date,

here, the way to accelerate the negotiation process or allow it to proceed as quickly as it reasonably can, is to put the case on a track that promises a litigated conclusion, if such is necessary, within the horizon and we don't have that yet, and extensions of the exclusive periods will forestall rather than accelerate the date when we will have that.

And so we are just speaking from a perspective of realism. The parties disagree drastically on what is the appropriate outcome. The issues have been usefully framed and aired in the debates concerning what aggregate estimation should be and what the scope of that discovery should be and we are nearing the end of those debates and thankfully moving into the next stage where whatever discovery is allowed takes place. We will have some depositions. We will have the normal pretrial process for a hearing on estimation, and the parties will be in a better position to evaluate their respective cases and what might be an acceptable compromise to produce a plan.

And I remind the court that every asbestos Chapter 11 reorganization to-date that has concluded has concluded in a consensual plan. The odds are overwhelming that we will get there in this case if we keep working, but the needful work now is to work on the asbestos issues that feed directly into the fundamental plan formulation building block of a solvency determination.

That's where the rubber hits the road in this case.

The debtors, from the beginning, have wanted to assure the court that they have a way of dealing with the asbestos claims, paying them a hundred cents on the dollar and emerging with their equity intact.

We doubt that profoundly because, from where we sit and our evaluation of the historical evidence, the financial burden of the asbestos claims which drove the debtors into bankruptcy to begin with exceeds, is likely to be demonstrated by proof to exceed the asset value, which fundamentally alters the debtors' options with respect to what kind of plan can be confirmed.

And they have their goal, which depends upon proof of solvency, and we have our view of the likely outcome of those disputed issues, and we believe that the debtor will prove to be insolvent by many hundreds of millions of dollars, which will extinguish equity and call for a plan of a certain shape.

Now, estimation in itself in this case has always been about plan formulation. When we came before you last fall, late summer or early fall with our motion for a scheduling order, we said that there should be a period, fairly brief but reasonable period in which the parties could evaluate the prospects for a consensual plan and begin to obtain the information needed to inform their respective views of estimation but that, failing that, within the extension that expired on April 1, under the then existing state of affairs in

the case, we would want the right to come forth and propose our own plan, that termination of exclusivity would be warranted if the initial soundings of the parties indicated that there wasn't a reasonable prospect at least yet of a consensual plan, and that's the state of affairs.

There has been no change in position on the committee's part. That has been our idea of how to bring the case to fruition within an acceptable period of time from the beginning.

So now we have – we agreed to an extension from April 1 to May 31 of the proposal period. That time is now lapsing. There is no plan. We would be ready to propose a plan very promptly after May 31. We are working with Mr. Guy and his team in tandem on formulating a plan, the fundamental assumption of which would be that the debtors are insolvent. We would have to prove that in order to confirm that plan.

So insolvency, or to say it the other way from their point of view, solvency is a plan confirmation issue. There needs to be a plan on the table when you consider that issue. I liken it to the initial pleading in a lawsuit that says what the cause of action is that the court then uses to delineate the appropriate scope of discovery and identify what the key disputed issues are. That has to happen and should happen. It will happen with most efficiency and the greatest clarity if a plan is on the table when the issues that feed into insolvency

or solvency are being litigated. We are prepared to frame those issues through a plan promptly after May 31.

The debtors, of course, will remain free to propose their own plan. Presumably they will. We understand from the paper that we received last night that they are actively thinking about some way in which to confirm a plan that wouldn't involve agreement with the committee or the legal representative. Fine. Let's see what it is. We need to know what those issues are as we evaluate our position going forward. There is no utility, there is no fairness, in hanging back from it.

The issue of solvency has been well framed already. We are in a contested proceeding for estimation for plan formulation purposes and it will help to clarify the appropriate lines of dispute and guide the court's procedural rulings, including the amount of time that ought to be permitted for fact discovery and the amount of time that ought to be permitted for expert discovery under each party's drastically different way of going about the aggregate estimation as has been clarified by recent events in the discovery motions practice.

You will be in a better position to arbitrate the implementation of discovery as it goes forward if you know what the goal is, what plan provisions turn on whether or not the debtor is insolvent.

It is also useful, as parties cite case law and advocate points of view about the disputed issues, for the court to keep clearly in mind that the purpose of this estimation, unlike others that are conceivable under the Code, is the formulation of a plan. We are not here estimating individual claims for allowance purposes. We are estimating the overall liability for the purpose of determining how the estate's assets ought to be allocated, *en gros*, among several constituencies, one of which under our plan would be a settlement trust to be confirmed pursuant to section 524(g).

If they have a different plan structure that doesn't involve 524(g) or anything like it and that they think that they can confirm over objection, then it would be healthy and useful for our constituency to understand what that threat is so that we can evaluate whether it is really viable, whether it is a serious downside or whether it is posturing. We need to know these things and so does the court.

So we have an ongoing willingness to negotiate. Mr. Magee has Mr. Rice's phone number. He has Mr. Grier's phone number. Those people get along fine. They just have significantly different views of the outcome. If that changes and discussions become fruitful, they can always have them.

What we would propose – now, let me address first the legal predicates for the idea that an extension isn't warranted. Two main themes have been sounded in the debtors'

bid for further exclusivity, one of which is progress in the negotiations and we have said enough about that. Progress in negotiations will be stimulated, not retarded, by allowing the exclusive period to lapse.

The other is that the case is large and complex. That is true in a sense and not in another. It is a rather simple case when it comes to the debtors' capital structure, to the minimal presence of non-asbestos, unsecured claimants, who will be identified pursuant to a bar date and who can, by our likes, expect a hundred cent dollars. If those claims are within the dimensions that we anticipate in terms of their number and value, the unsecured creditors are likely to emerge unimpaired.

So the real complexities lie in how do you apply the Bankruptcy Code provisions to a mass-tort bankruptcy where substantially all of the claims are unliquidated and there's a whole lot of them in the future, and that was the subject of all of the evidence and argument that you heard last fall in the case administration motions, and that situation hasn't changed.

What you decided to do is focus the parties in the case on aggregate estimation for plan formulation purposes. The logical next step in that process is to bring forth the plan, either a creditors' plan or a creditors' plan and a debtors' plan and let us join issue on the ultimate questions of how this case can get from here to exit from Chapter 11.

So the complexity of the case is intimately bound up with the asbestos issues, and you already have us heading in the right direction with respect to aggregate estimation. It is time to formalize that through the filing of the plans.

Now, the argument is made that the exclusive period has been consumed in debate about what scope of discovery is appropriate for aggregate estimation, and in a sense that's true, but that results from the debtors' aggressive agenda, which they were very clear about announcing at the beginning in their information brief. Their idea was that they could come into Bankruptcy Court in order to do better in their disputes with the individual asbestos claimants through bankruptcy processes and win lower resolutions of those claims than they could achieve in the tort system.

We have a fundamental objection to that objective as a proper restructuring goal. We don't think that's a proper reorganization purpose under the code, but we are not at a point yet where we can ask you to rule on that. We hope to get there.

But the point is they have chosen to push the envelope in terms of their attack on the claimants, in terms of the discovery that they would seek for the purposes of that litigation agenda, and their entire approach to the case called for litigation, not planning. They make some gestures to planning on the side. That's fine. I am not disparaging their

right to litigate at this point. I am just pointing out that they have chosen a path, and the path that they have chosen is one where each discovery motion sort of pushes the envelope further in terms of virtually unprecedented discovery for purposes of aggregate estimation that they want to perform in a manner that no one has ever succeeded in doing and that their own expert has never found it necessary to do.

So I won't belabor those points. You have heard an awful lot about them over the past few months. My present point is simply that it's true there has been a lot of debate about the scope of discovery. I hope the court has found it useful. It has sharpened the parties' respective ideas about what the appropriate estimation ought to be. We are on the verge of joining issue on those matters, and let's go forward with it. The way to do that is to allow exclusivity to lapse and bring on the plans.

The debtors' discovery can be administered in the context of confirmation proceedings, which is what estimation is all about here. Since estimation here is for plan formulation purposes, it's a confirmation issue. It's properly conceived of as a phase in a confirmation hearing of several phases. We have to value the assets. We have to value the liability as the committee's expert would do it. They seek the right to value it in a different way. And each of these may imply a separate hearing or separate stage of what is a

confirmation hearing leading to an up or down judgment with respect to a proposed plan. We need to get moving down that path. It's the best way to bring the case to a head. It will stimulate and not retard the opportunities for a consensual resolution.

So, Judge, what we are asking for is exactly what we suggested we would be asking for last August if the initial extensions didn't produce promise of a consensual plan within a reasonable period of time. We want to bring forth a plan. We are happy to receive a plan from the other side. We want discovery cutoffs after meeting and conferring with the debtors and we get through the rulings on their outstanding discovery motions. We think that their idea that there should be some kind of exchange of pleadings or briefs on the estimation methodology - that's how I am understanding what they have suggested in this paper last night. It is not exactly how they put it but they wanted some paper filed setting forth the parties' affirmative estimation method and the purposes of it. Presumably there would then be time to respond to that. We think that exercise was a good way to bring to a head what has been learned over these last few months of debate about the nature of estimation and the scope of the necessary discovery, but there is no reason to wait until August for it. We can file a brief on our affirmative way of estimating liability by the end of this month, and we would like to respond to theirs

in time for the June hearing, which is late in June. We think that the court would be well-served by such an exchange of briefs.

For example, the debtors' persistence is suggesting that the settlement database is not even going to be admissible, much less an appropriate basis for an aggregate estimation, notwithstanding that every court that has concluded an estimate to-date has used that same method.

Well, okay, let's bring that issue on. We need to know if Your Honor is going to rule that the settlement database is not admissible because of Rule 408. We need to know so that we can come up with an alternative. We think that issue is clear-cut and that you are going to readily conclude that the debtor is mistaken, but they are entitled to take their shot at that. What they are not entitled to do is hold that over our heads indefinitely until we get to the end of the exclusive period when they will produce a plan that they will view as obviating our approach to estimation, and so this Rule 408 issue just hangs there in the clouds over our heads until the very end of the process, and their game would seem to be not resolution of that issue but simply having it in play, but we want to bring it to a head and we would like a ruling. There is no reason to wait on that.

That's an example of what can be expected by way of constructive developments that will influence each side's

evaluation of their situation in this case and what the chances of achieving what they believe to be the appropriate outcomes may be. There are other issues like that, that will also benefit from being joined and argued along the way.

So we need a track. The track should be one that ends in a final confirmation hearing with previous stages for the issues that go into the plan formulation. And left to our own devices, because ours is not a discovery intensive methodology, we think we could be ready for an expedited evidentiary hearing on our way of doing the estimation in the early fall, fairly promptly after Labor Day. The debtor is not in that situation because their discovery is more ambitious. There is no reason why we can't proceed on those two tracks.

The two methods are in effect ships passing in the night. Both need to be progressing. Neither one needs to be retarded by an extension of exclusivity. So let's get on with it.

So we are asking for the opportunity to meet and confer with the debtor over the overall schedule for discovery, fact discovery, expert discovery, whatever motions practice the parties may contemplate with respect to the estimation methodology or other confirmation issues and firm hearing dates for the different stages of the confirmation process in this case.

That's our request now, as we promised it would be

back in August if the interim developments didn't point us to a confirmable plan, and regrettably they have not.

There is no present opportunity for a consensual resolution. So we need to be deciding the issues and litigating them in the normal course on a reasonably expeditious track.

Thank you, Your Honor.

THE COURT: Mr. Guy.

MR. GUY: Your Honor, I can proceed now or if the court would like to take a break.

THE COURT: Do you all want to take a break? Let's do. Let's take ten minutes and come back about ten until eleven.

(Recess from 10:40 a.m. until 10:53 a.m.)

THE COURT: Okay. Mr. Guy, I believe you have the ball.

MR. GUY: I will try not to drop it.

Your Honor, Jonathan Guy for the FCR. Before I start, I have a couple of documents and I am not trying to get them in as exhibits because they are already in the record, but they may be helpful for the court. I have already distributed them to the parties.

THE COURT: All right.

MR. GUY: May I approach?

THE COURT: Yes.

(Pause)

MR. GUY: Your Honor, the issue is whether extending exclusivity will facilitate moving the case forward. And on that issue, we agree it will. We disagree with the length of time. We believe that a short extension of one month is appropriate and this is the reason why:

Your Honor, there is no doubt that the debtors find delay in the case to be helpful. I do not question their good faith to move forward but delay is helpful. We know that from just the reality that it's cheaper for them to be in bankruptcy than it is to be in the tort system. We also know that because Mr. Macadam, the CEO and president, and I have referred to this analyst call before and it's attached to the ACC's last filing on exclusivity, and this is in response to a question about what's happening in the bankruptcy case. He said:

> "The thing is the thing moves very, very slow, and we actually think, although in my remarks obviously we would love to be done with it" – and I am sure they would – "and put it behind us, but the simple fact of the matter is, as time rolls forward, I believe our leverage in the case increases because the discovery that we are trying to do in the currently already formed asbestos trusts from the other companies is going to reveal the double-dipping behavior that we have continued to allege and are virtually certain is going on. And the more of that that comes to light,

I believe the more leverage that we get in the case. So really we are in no hurry."

And then towards the end he says:

"So, anyway, the thing is moving very very slow. It is a costly thing to litigate, but it is far less costly than staying in the tort system."

Your Honor, that is what is going on in the case. The debtors would like to get discovery to gain leverage. That's their prerogative and they are getting discovery in this case. The court has allowed them to proceed with their questionnaire, but there is no doubt that delay helps them.

The second thing I want to allude to, Your Honor, is the chart that I handed up, and this is straight from the record and I circulated copies to the other parties, and I believe it's all accurate but, if we made some mathematical errors, I would be happy to change it. And I am not highlighting any professional or any entity, Your Honor. It just speaks for itself. The bottom line is the total professional fees in –

MR. CASSADA: Mr. Guy, do you have another copy?

MR. GUY: Yeah.

MR. CASSADA: Thank you.

MR. GUY: The total professional fees are approximately ten point eight million, Your Honor, and expenses are about five hundred and sixty-five thousand. However you slice that,

that is money that would be better served either paying creditors or allowing the debtors to run their company. And one thing that my experience in the bankruptcy cases has taught me, even though it shouldn't be the case, is that meter that's running at about a million dollars a month will continue to run for as long as we are in the bankruptcy case. So you have heard from us before, Your Honor, and I know that Your Honor wants to do the same thing, we want to get to reorganization as quickly as possible.

The next thing I want to refer to before getting to why I think a one-month extension is appropriate is something that Mr. Miller talked about, and those are Mr. Clodfelter's remarks at the November 19th hearing. We have a lot of respect for Mr. Clodfelter. I am not arguing with what he was saying. That's for another day. But I have marked it in the transcript that I handed up to you, and what Mr. Clodfelter was arguing was – and I have highlighted the relevant pages but they are all there for everybody to see if they need it. On 1191 he says:

> "Because the dissenting equity interest can't be extinguished or dispossessed without an 1129(a)(7) and section 726 analysis, then liquidation of these debtors actually becomes a real alternative for consideration. Because in a true Chapter 7 liquidation, the assets are going to be distributed

only to those claimants whose claims can be liquidated for distribution when the trustee files a report and closes the case. And that means that future claimants don't exist in that world. They disappear."

Your Honor, I don't necessarily agree with that but the purpose I am raising it is just to talk about the intentions of the parent, EnPro, of the debtor that is before you, Garlock.

And then on 1193, Mr. Clodfelter continues:

"So looking at the alternative of a liquidation scenario, I have to look at my client and say you should consider, before you accept any plan that extinguishes equity, you should consider the liquidation alternative."

I will explain in a minute, Your Honor, why that's very relevant.

Now let's turn to the debtors' filing on this very issue. They are very straightforward, Your Honor. They say that they want to extend exclusivity and they hope this will permit discovery to produce sufficient evidence for the parties' experts to develop their claims estimates and opinions regarding the values of the debtors' assets in a way that will aid negotiations for a consensual plan, perhaps with the assistance of a mediator.

Your Honor, I think the true purpose for the discovery

is for leverage. I don't believe that the true purpose for discovery, even though it's relevant to their arguments, is that they need it to estimate their asbestos liability. Why do I believe that, Your Honor? Because Dr. Bates, who is their expert and has been their expert on this issue for a number of years, has already estimated their asbestos liability. He has done it in securities filings that are being made public, and he has estimated that liability by reference to the information that is available to him by the data that he has about the claims, by the data he has about the history of the debtor, by the data he has about the asbestos that was contained in their products. He has estimated that in the region of four hundred and eighty to six hundred million dollars.

So we know that Dr. Bates can testify on that issue today. Now, he may want more but we know he can.

Then I would like to refer to what I believe is the legitimate reason for extension for exclusivity which is also in their filing, and this is on page three. There they talk about the unanticipated change in circumstances with regard to their characterization of the ACC's current disengagement from further negotiations, and they say:

> "The debtor should be permitted an opportunity to formulate and file a plan that could be confirmed over the ACC's constituency's objection in the event the debtors are unable to successfully negotiate a

consensual plan."

Your Honor, the debtors have been preparing for this case for a very long time. They are not my documents. They have been preparing for this case for a very long time, but I am going to take at good faith that this has been a change that they didn't expect, a position that they didn't expect. And if they need to come up with a plan that's very different from a plan they had in mind before, which I assume was a standard 524(g) plan, then they should have some time to do that. I am sure they have been thinking about it. I am sure they have in mind exactly what they want to do. I don't know what that is, Your Honor. I want to know and the court should want to know in short order how they can address the issue of confirming a plan, how they can address absolute priority issues, how can they address best interest issues, how can they address affirmative voting issues. The court should know and the FCR is entitled to know in short order how they can do that.

If they need two weeks to do that, if they need three weeks to do that, if they need a month to do that, that's fine. A month should be more that sufficient, Your Honor. There are a lot of very capable professionals on the debtors' side. That should give them more than enough time to file a plan.

Your Honor, when we talk about the plan and creditor plans, debtor plans, in my mind that is somewhat of a – I don't want to say it's a red herring but it is not really getting to

the core of the issue because the truth is reasonable parties today could file a plan that says creditors get what they get in terms of the extent of their liability. The debtors have said they are solvent. We are not sure whether they are solvent. The ACC has said for sure they are insolvent. But that's the issue. So the plan could be written right now and filed right now, tomorrow. It would simply say, if they convince the court in an aggregate estimation hearing, which the court has given very clear instructions that that is the path that we are going down, if they convince the court that the value of the company is greater than their liabilities, then Mr. Clodfelter, his company has equity.

If they don't, they don't, and the value of the company goes to pay the creditors. That's the way bankruptcy works, and that's the way it works in this context where it is unrealistic, unviable and not within this court's jurisdiction, which creates a whole host of problems and the court has already alerted them, to adjudicate individual claims.

So why do I refer back to the remarks about liquidation? It's because we are entitled to know what the debtors' intent, sooner rather than later. Do they intend to accept the court's ruling on the size of the liability? That presumably will be in their plan. Or do they intend to go forward with an estimation hearing and then subsequently argue, well, no, no, we now would like to have a claims allowance

proceeding, or we would now like to have a hearing about whether the debtors' products are hazardous or not. We should know that, and that will be in their plan. There will be a clear path for us in their plan.

Your Honor, in terms of estimation theories – the debtors have proposed that, the ACC have agreed – we are absolutely on board, Your Honor, because that's what we need to get before the court. We need to have an estimation hearing as soon as possible. The sooner we do that, the sooner we can stop the hemorrhaging on legal fees, the sooner we can find out whether we are going to have a situation where the debtors will honor the results of that hearing or whether they will say, well, in that instance, we are going to liquidate because then we have another fight on our hands.

I don't want to go through the time, expense and trouble, and I am sure the court doesn't either, of all of this questionnaire fight and estimation hearing, expert testimony, hours and hours and hours, tens and tens of millions of dollars, if at the end of the day EnPro says, well, we don't like that result, so now we are going to move to convert, which is what we have right here.

So how do we get to find out? They are not going to foreclose that opportunity today, Your Honor, I am sure. How do we find out? Well, let's get a plan on the table. I know the debtors can do it. They have the ability to do it. A

month gives them sufficient time to do it. It's not going to change anything. What's going to change – the filing of a plan isn't going to change the solvency point. We need to get to the solvency point and then we will know where we are.

Thank you.

THE COURT: All right. Mr. Clodfelter.

MR. CLODFELTER: Your Honor, thank you. I have one principal point I want to make. Obviously we endorse Mr. Miller's presentation to the court, and I want to elaborate really on one point in addition to what he said, but just a couple of brief responses to clear away a couple of red herrings.

I greatly appreciate Mr. Guy's solicitousness for position of equity on professional fees in this case. We are watching those quite closely because it is our money that's being spent first in this case. So I appreciate his concern for that, and I am sure that he in his own professional practice is mindful of the position of equity on that point, but I don't think exclusivity is the proper way to address that issue. The court has full control over professional fees and the rulings on interim fee applications, and we have confidence that the court will police professional fees appropriately in the case. That is not a ground for denying extension of exclusivity or terminating exclusivity.

I also will not, as we have agreed this morning, go

into any of the details about the parties' negotiations today except to say, to the extent Mr. Swett characterized the current state of those negotiations as being a realization that the positions of the parties were too distant for them to be bridged, my client does not agree to that characterization from the state of discussions, and we will leave it at that unless the court wishes to discuss privately with the parties further on the subject. I don't want to leave that, however, standing unrebutted. Our view of the matter is somewhat different.

The principal point I want to make is this: It is very concrete and it's very tangible. It has nothing to do with generalities about the overall position of the case. It is very specific to the personal information questionnaire.

We started this process, as directed by the court, and the debtors have in good faith and proceeded to try to develop the evidence necessary for their theory of the case. We have come now to the point where the court has permitted them to proceed with a personal information questionnaire. That questionnaire will develop material evidence material for all parties who may be propounding claims, whether they be the debtors, or whether they be any of the creditor constituencies, or whether they may be the parent entity. That evidence will be highly material for the purposes of formulating a plan. We can today, as could anyone in this court, go back to the office and generate a piece of paper called a Chapter 11 Plan of

Reorganization and file it this afternoon, but would we be able to say to you that we have made any reasonable determinations about whether we properly classified claims or whether we know that that plan has any realistic chance of being feasible in terms of consummation, whether we know whether it can or cannot meet the best interest of creditors test or whether, if necessary, it could meet the absolute priority rule if that comes into play.

And I think again the personal information questionnaire is highly material to the determination of all of those questions. Any party who wants to responsibly proceed today with a plan, be it the debtor, creditor constituencies, or my clients, needs that information in order to do a job of classification, analysis of feasibility, analysis of best interest, and analysis of absolute priority.

If we proceed in the absence of that, I think we have been wasting our time over the last six months, all of us have been wasting our time over the last six months. We would hate to see those professional fees have been wasted certainly for that purpose.

We think the responsible thing for all parties at this point is to proceed with the personal information questionnaire to get the results back and then allow all parties who wish to do so, to consider those in light of what plans they might wish to propose, formulate, negotiate consensual or proceed with on

a litigating basis.

Very tangibly why it makes a difference is this: It's significant when we were in court last November, at that point, based upon the parties' available information at that time, the estimate was that the debtors had currently about fifty-seven hundred active mesothelioma claims. As a result of the evidence that has been developed since that date and the review of the documents and available information since that date, we can say today that we think the number of active mesothelioma claims against this debtor is less than four thousand. That is not an insignificant difference in terms of formulation of a plan or the judgment of feasibility of that plan or any of the other criteria that have to be considered for confirmation. It is material not only for us, as I say, but for every constituency in the case.

A personal information questionnaire is designed and intended by the parties, intended by the court, to further flesh out that information so that we can know what is the universe of claimants with which we are dealing. It is an absolutely fundamental question. Fundamental for insolvency determination, fundamental for any plan confirmation.

With that, Your Honor, I think for that reason alone the court needs to let this take its course, not terminate exclusivity or deny the debtor its opportunity to react to that information, prepare within the exclusive period a plan of

reorganization.

So with that, I will stop and rest on the arguments of Mr. Miller.

THE COURT: All right.

MS. FLETCHER: Your Honor, may I be heard for the trade creditors committee?

THE COURT: Yes.

MS. FLETCHER: There is one issue that I think is maybe obvious to everyone but I think has not been stated, and that is that, while the prepetition trade creditors may be a relatively small constituency here, they are a constituency and many of those trade creditors are extending credit to the debtor on an operating basis and as a result of the understanding that the debtor will come out of this, will reorganize, will file a plan, will resolve its issues with the asbestos claimants and that there will be a plan proposed.

The termination of the debtors' exclusivity period where the debtor can propose such a plan will have a tremendously negative effect on the trade creditors, not only the prepetition creditors and their confidence in the debtors getting through this but also if there are other creditors who are not - parties who are not prepetition creditors who are extending credit, the debtor is doing business with, those parties in dealing with the debtor if they learn that the debtor has lost the exclusive right to file their plan of

reorganization.

This is an operating debtor with, I understand, approximately six hundred employees and it is trying to do business in a way that has nothing to do at the present time in terms of its operation other than this bankruptcy case with the allowance of the asbestos claimants.

I agree with everything that Mr. Swett and Mr. Guy have said in terms of things need to be brought to a head, but I do disagree that the termination of the exclusive period for the debtor to file a plan is really going to advance that ball, and I think it will have a tremendously negative effect on the creditor constituency that I represent and also the best interest of the estate, and I think there are other ways to force the issues, if there is going to be a consensual plan, to bring that forward with what the debtor has proposed, and I ask the court to keep that in mind in terms of its decision on exclusivity.

THE COURT: Well, I think I ought to grant the debtors' request and, to the extent there is any motion to terminate, decline to terminate the exclusivity and grant the debtors' request.

I guess the temptation is there to put a short string on it and keep a little more control over it, but the basis for extending it is largely to allow the discovery to take place and that has already been authorized. And I think any

realistic guess of when that might happen would push us out towards what the debtor is requesting already. So there is probably no reason to play games and have this exercise again in August or September or sometime.

So let's just go ahead and I will grant the debtors' request and, as I say, I think the debtor is entitled to get the benefits out of the discovery that's been authorized. I know the debtors wanted more. Our ideas on what the debtor needs have been a little different and may continue to be so and may not. But at least with what has been authorized with the questionnaire and such, I think we ought to give that time to play out and just see what happens, see what the response is, see what information is produced, if any.

So I will grant your motion if you will do such an order.

MR. MILLER: Thank you, Your Honor.

MR. SWETT: Your Honor.

THE COURT: Yes.

MR. SWETT: The debtor did move for the extension. I understand that's been granted. And last night they filed a paper laying out a bunch of interim deadlines. I take it that is not part of what has been granted. For example, mediation –

THE COURT: No. No, right, because I haven't really looked at that either, but I think it is probably best if you

all talk about that before I consider a schedule, but I think at this point we will extend the exclusivity period as they asked. And to the extent they have presented this, as I say, I didn't look at it last night either. I think what I ought to do is not set any kind of schedule today based on what you all have suggested but allow you all to talk about that and see where we go.

MR. GUY: Your Honor, can I have a clarification?

THE COURT: Yes.

MR. GUY: I believe they asked that it be extended through November 28, 2011, but I don't think that is the final period of the statutory exclusive period. Are we done now or are we going to be revisiting this at the end of November?

MR. MILLER: Your Honor, the way that we calculated that was just to take – I think to take eighteen months instead of trying to count up how many days are in the total number, the total period from – so there may be a couple of weeks stub period on the end there, but the debtors view the November 28th period as the full extension of their exclusivity period. We just tried to calculate it conservatively.

THE COURT: All right. Okay. Where do you want to go to next?

MR. CASSADA: Your Honor, I would like to briefly address the bar date. As the court may recall, we requested a bar date and Your Honor announced a bench ruling, I believe on

November 18 of last year, and then entered an order on December 9. And in that ruling the court said that the bar date motion was denied without prejudice and would be further considered on May 12.

Now, we, Your Honor, interpreted that to be that you would determine whether a bar date was necessary as we got through the preliminary discovery period, and our understanding was that the court was motivated by promoting the possibility for a consensual plan that might obviate the need for bar dates and proofs of claim.

There have been additional hearings, one where we brought up the bar date and indicated that we would be asking the court to further consider that today, and I heard the court say at that hearing that the court was not going to revisit the bar date.

In any event, Your Honor, we need clarity on that point. So I am going to briefly talk about the bar date. I am not going to rehash all of the arguments that we have made before under the code, but I will briefly state why we think a bar date is required and then ask the court to enter a ruling there to give us certainty on that issue.

Your Honor, as we have pointed out, the debtors dispute the asbestos claims against them and we think we have shown the court for good reason. The debtor is not like the insulation defendants and other high-dose, manufacturers of

high-dose asbestos products. Garlock tried hundreds of cases during the time that it has been in asbestos litigation, and we believe that we offered evidence to Your Honor that, when the evidence that plaintiffs were exposed to insulation products and the products of other high-dose defendants who filed for bankruptcy in 2000's, when that was on the table, Garlock almost never lost a case. In fact, in the few cases that Garlock did lose by virtue of the joint and several rules and setoffs, Garlock's responsibility in those cases tended to be very small.

And, as a result, when we are looking at Garlock's potential legal liability for a claim when the responsibility of all defendants is on the table, Garlock's liability, we believe that Garlock had no liability and that the settlements that Garlock reached were settlements in lieu of defense costs because defending claims is very expensive.

And, of course, we offered Your Honor evidence that in the 2000's evidence disappeared and Garlock's results changed. Now Garlock still won more cases than it lost and Garlock still got credit and sometimes didn't have to pay a judgment because setoffs from settlements produced what we have identified as take nothing judgments. So Garlock still had defenses, very viable defenses, but the litigation risk changed because the most culpable target defendants filed for bankruptcy and they hadn't yet set up their trusts. So we explained that.

But what we believe the settlement history shows is the substantial bases for objections to Garlock's claims and the substantial need for evidence to support those claims.

Now, as we have shown and argued, proofs of claim are mandatory. A contested Chapter 11 case cannot proceed without proofs of claim and indeed, under Rule 3003, claimants who hold disputed claims cannot be treated as creditors in a bankruptcy case for purposes of voting or distribution unless they file proofs of claim.

And as the court knows, the Fourth Circuit has told us that proofs of claim are mandatory even in a mass tort case, even in a mass tort case where claimants have filed lawsuits and have complaints pending in federal court, federal and state courts around the country, as they did in that case.

And finally, Your Honor, Professor Gibson, who has produced a noteworthy manual on the management of mass tort bankruptcy cases, has written that proofs of claim are mandatory. Without proofs of claim, the potential creditors are not parties to the case and indeed now we are serving personal injury questionnaires on them which really has to be regarded as third-party discovery.

So importantly for the debtors, Your Honor, proofs of claim are integral to protecting the debtors' rights to contest the validity and amount of claims. In fact, if we look at the bankruptcy code, literally all of the key provisions that

adjust the rights between the debtor and creditors and equity, they all are based on proofs of claim and the court's determinations as they relate to proofs of claim.

Now, it appears increasingly likely or possible that we are going to be heading down a contested confirmation path and just to cite a few issues where proofs of claim will come up, we have voting. Under 1126(a), only holders of allowed claims or interest can vote and, therefore, in order to vote, a claim has to be filed and there has to either be no objection to it or that objection has to be resolved or the Bankruptcy Code says that the court can temporarily allow a claim and value it for purposes of voting, but there has to be a proof of claim before that can happen.

For estimation, Your Honor, estimation occurs under section 502. 502(c), to be precise. You don't get to that section unless proofs of claim are filed, and the court heard the progression and is quite familiar with it, when the debtor lists claims as disputed which is a debtor's right, and then claimants have to file proofs of claim. The debtors can object and, once they object, the court has to allow that claim or either liquidate or estimate the claim for allowance purposes.

And indeed that process defines creditors' rights under other provisions of the code. If we get to a confirmation hearing, then there will have to be a determination of whether a plan meets the best interest test.

You have heard a lot from Mr. Clodfelter and from Mr. Miller here today that that test, you can't even begin to make that test unless there are proofs of claim.

And finally, Your Honor, before any plan can be crammed down on a party-in-interest under 1129(b)(2),(B) and (C), the court is going to have to determine that the holders of allowed claims – that's a defined term that goes back to 502 – will be receiving an amount equal to the amount of their allowed claim. So the court doesn't know what the amount of allowed claims are unless proofs of claim are filed because allowed claims don't exist unless they exist under section 502.

So it's clear that a contested bankruptcy case, a case where the debtor disputes liability, cannot go forward and cannot be resolved without proofs of claim.

Now, we have heard a lot from Mr. Swett today and at other times about how the debtor is proceeding in uncharted waters and wants to do something that's never been done before and that there has never been an estimation in any case that has ever used anything except for the so-called standard method and settlements. But we disagree with that. If the court looks at the cases that have proceeded, there are four of them where the debtors disputed liability for asbestos claims, and in all four of those cases the court concluded that it had no choice but to enter a bar date and require proofs of claim.

We talked about the USG case when we were here last

before you and we talked about how in that case the court ruled about the information the debtors were entitled to from creditors, but that case is particularly instructive because it's a district court and that district court was looking at the very same issues that this court is grappling with. In that district court, Judge Wolin, he determined that once USG exercised its right to dispute that its asbestos claims rendered it insolvent, that the Bankruptcy Court had no discretion.

Again, in that case the committee was appearing and saying that proofs of claim would be contentious, be unmanageable or take too long, or be too expensive, and they are unnecessary because this debtor is obviously insolvent if you look at the claims database. And the court concluded in very compelling language that, if the debtor contends, disputes the claims, then the curt has an obligation to let the debtor present its case.

And the court set a bar date for mesothelioma claims and ruled that the court were to hold an estimation hearing under section 502(c) – again, you don't get to 502(c) without proofs of claim – at which the debtor would be permitted to present their defenses. And then the court said, without deciding precise procedural devices, about how those defenses would be brought. The court observed that the debtors may wish to attack certain medical evidence under *Daubert* and the

Federal Rules of Evidence and also that the debtors would have the right or may wish to move for summary judgment on certain issues on a claims-wide consolidated basis pursuant to Federal Rule of Civil Procedure 42.

Now those issues aren't before the court today, but the instruction from that case is that debtors in a bankruptcy case have rights, as do claimants, to dispute claims and to present their defenses.

There have been three other cases where debtors disputed liability and in every single one of those cases the court eventually ordered bar dates and provided discovery that allowed the debtors to present their defenses either in an estimation context or through a limited allowance proceeding. And I am referring to the *Babcock & Wilcox* case, the *W.R. Grace* case and the *G-I Holdings* case.

Now we have seen engaging language from cases cited frequently by the committee in the *Owens Corning*, *Armstrong*, *Federal-Mogul*, *EaglePicher* and other cases, but all of those cases, Your Honor, were cases in which the debtor didn't dispute the claims, didn't dispute liability and supported eventually plans that the result of which wiped out equity.

Mr. Swett says, well, no court has ever gone down this path. The reality is in every single one of these cases, when the proofs of claim are on the table and the process for allowing the debtor to present its legal defenses was to begin,

there was a settlement. And then once there was a settlement, that settlement determined the funding of the trust and then the case was turned over to let the committee and the future rep present evidence under the so-called standard method with regard to settlement payments and how money should be distributed from the trust.

But I think that it is wrong to say that there is no precedent for our position. In fact, we think that the opposite is obviously true. There is no precedent for the committee's position. We are not aware of any case where a debtor has not been able to exercise its right to have proofs of claim filed, have not been able to exercise its rights to have claims determined based on legal liability and not settlements.

We saw some discussion in the committee's brief about the exclusive period, taking on the debtors' statement that settlement payments can't be used to determine the debtors' liability, and the case they cite is *Babcock & Wilcox*. Now what's important to understand about that case is that the case cited was a fraudulent transfer case. It was a case under Louisiana's revocatory statute and the issue was different. The issue was whether the debtor and the shareholder had a reasonable basis for believing their estimate of claims prepetition that supported a huge dividend from Babcock & Wilcox to its parent. And eventually the court ruled that they

did but considered what settlement results they were achieving in determining how that factored in to their good-faith basis for believing their projection. And the court said at the end of that opinion I am going to be doing – there might be other estimates in this case, including an estimate for purposes of any plan of reorganization for determining the debtors' liability and this opinion has no effect whatsoever on that.

And, in fact, as we learned in that court, a determination was made that the debtors had a right to present their legal defenses and hearing on those defenses would be scheduled up when settlement was achieved.

I am not aware of any case where the court went to a contested confirmation hearing where there weren't proofs of claim and used the debtor's settlement history to impose liability and to determine what the debtor's responsibility was for claims.

Now, we have also heard from the committee that the debtor is trying to, quote, do better than it could do in the tort system and they are pushing the envelope, and we disagree with that, Your Honor. We are doing nothing more than exercising our rights under the Bankruptcy Code to dispute claims and to have claims determined in bankruptcy based on the same legal principles they would be determined under state law. That's what the district court, Judge Wolin, decided that the court was bound to give the right to the debtor to do in USG.

Again, it's a little misleading to say that no debtor has ever been successful in pulling that off because in all of these cases an agreement was reached preserving equity on a plan about funding a trust before the issues were ever joined in the actual courtroom.

In any event, Your Honor, we have heard from the court that it doesn't plan to revisit this issue. Obviously that's a big disappointment to the debtors, but at this point we would ask the court to either enter the bar date or to enter a final ruling on the debtors' request for a bar date.

MR. SWETT: Your Honor, from the beginning of the case, the debtors have signaled that their intentions for the bankruptcy case were in effect to reprise or redo the issues they have been litigating for a generation in the tort system, and now it appears that, with similar rigidity, the debtors are not taking the learning from the rulings made along the way in this case so far and that we are going to have perpetual debates about the bar date.

Suffice it to say, though, that what is clear in the code and in the rule is that you have discretion with respect to when a bar date is imposed, and last fall we showed you at great length with a lot of evidence from the other bankruptcy cases that the voting issue, that all of the other kinds of things that the debtor has argued about today, have been handled without imposing bar dates in midstream, and I refer

you back to those transcripts and that evidence as the fullest answer to the points that Mr. Cassada has made in summary fashion today, but I will respond in similar summary fashion, trusting that the court is aware of the record already made on this issue, which of course supported the ruling it made in December that we are not going to allowance proceedings. That would be the only conceivable purpose for imposing a bar date now. Since we are not going there, it would serve no purpose.

Since we are going to an aggregate estimation, one of the virtues of which is that the individual claimants are not parties and so cannot assert their due process rights in a fashion that makes it more difficult to get the estimation done, that makes it necessary for the court to focus on individual disputes, we are circumventing that at this stage for the purposes of plan formulation. There is absolutely no reason to impose a bar date now for plan formulation purposes.

You know, it is interesting the debtor says that it believed it had no liability in the tort system but, of course, if you read the EnPro 10-Ks, when it comes to the litigation disclosures, you find Dr. Bates' estimate of what that non-liability would be in terms of dollars. It is hard for me to understand that position in light of the admissions made yearly by the debtor over a great many years.

There is oblique reference in Mr. Cassada's argument to *Robins* as somehow instructing that bar dates are mandatory.

There is no such decision in *Robins*. The bar date decision or the decision having to do with a bar date in *Robins* in the Fourth Circuit was one simply enforcing a bar date that had been imposed against some claimants who, under the peculiar circumstances of that case, failed to submit some required statement in a timely fashion, argued that that wasn't part of the bar date. The Fourth Circuit held to the contrary and simply enforced the bar date that no one had appealed from in the first instance.

There is no learning in the *Robins* case that you must impose a bar date midstream in a mass tort bankruptcy. In fact, the opposite ruling by the *Robins* court in another appeal was that, rather than go the route of allowance proceedings, the debtor, who only faced five thousand claims total at that time, as I recall it, must go the way of estimation because otherwise they would consume the estate's resources inordinately in individual disputes. So that authority does not support the debtors' position.

We showed you how in case after case bankruptcy courts have exercised their power to allow asbestos claims temporarily for voting purposes, and we also showed you that in many cases the ballots themselves had been deemed to be the proofs of claim and not required until the very end of the case, certainly not as the parties are moving into an aggregate estimation that doesn't have anything to do with allowance.

So these are inapposite arguments, we submit, that the debtor is making and, moreover, more to the present point, there is nothing new in the arguments. You have already heard these. Nothing has changed in the evolution of the case to suggest that now is a sensible time in which to impose a bar date that you weren't willing to impose last fall.

This estimation proceeding that we are embarking on, as I said from last December forward, is for plan formulation purposes, not for allowance. Section 502 issues are thus beside the point. Section 502 is part of the scheme that the code provides for allowance. We continue to believe that the only reasonable and feasible outcome to this case is a 524(g) plan where the trust, not the court, will evaluate the individual claims and pay or deny them. In effect, there will be no allowance process in this case if it goes in that direction. Since that remains, even under the debtors' papers, the principal goal, the preferred route, if we can overcome the obstacles to getting there, there is simply no point in setting up such an obstacle by calling in all these tens of thousands of claims now at a time when we are focused on aggregate estimation.

We disagree profoundly with the debtors' recitation of authorities and the meaning of the *G-1*, *USG*, *Babcock* and *Grace* cases. You heard all about the Babcock allowance process and how it collapsed last fall. You have heard about the very,

very difficult process, in the guise of estimation but with sort of *sub rosa* allowance aspects to it, that the *Grace* case found itself embroiled in and the magnificent expenses and huge costs in terms of time and money that that entailed. Hopefully we can avoid that here. It is not a very affirmative authority.

G-I Holdings, Mr. Cassada is simply mistaken. The debtors moved for a bar date in that case. We opposed it. The debate went forward from one approach to estimation that they proposed that the court rejected to another approach to estimation in connection with which the debtor withdrew without prejudice its bar date application and that application was never renewed. In the end, there was a consensual plan. There was temporary allowance for voting much as I have described the process in the other cases, but the simple fact is there was no bar date.

But it's true that the debtor advocated for a personal injury questionnaire which was granted and they hoped to have an estimation process that somehow spilled over into the substance of their defenses to the tort claims and the court allowed the questionnaire. It was never issued and that process never actually went forth. There was a plan.

The relevance of the Babcock fraudulent transfer decision is simply that it shows that the debtor has somewhat overstated the idea that, in any contested setting where the

debtor wasn't consenting to the use of its settlement information, that information wasn't admissible. That's not true. It was a fraudulent transfer case. The debtor was the committee's party opponent. The committee proceeded through Dr. Peterson to put on an estimate based upon the historical settlement information. They objected and argued that it wasn't admissible under Rule 408. The court held to the contrary.

The holding that Mr. Cassada recited today was simply that in the end, under the peculiarities of Louisiana law, which is a unique statute in force nowhere else in the United States, the court accepted that the historical estimates made along the way by management were reasonable and under that statute that defeated the fraudulent transfer claim. That's beside the present point. The point now is the settlement information was admitted.

I guess this is all a little bit tangential to the bar date issue but it responds to a point that the debtor keeps trying to reinforce and mistakenly argue. Hopefully we get that cleared up in the process going forward of the aggregate estimation.

We have set forth in conclusory fashion, with record citations in our response to the renewed bar date, the record basis that supports your December 9th ruling that no bar date should be imposed at that stage. We submit, Your Honor, with

respect that the same considerations, when brought to bear on the situation now existing in the case, compel the same conclusion. The bar date motion should therefore be denied.

Thank you, Judge.

THE COURT: Mr. Guy.

MR. GUY: Your Honor, we had six days on this issue before. The court properly denied it without prejudice, gave the parties an opportunity to conduct discovery for the purposes of getting to aggregate estimation. The court also encouraged the parties to negotiate and develop a protocol for identifying pending asbestos related claims that may be considered to have been abandoned or otherwise no longer viable claims. I am not aware that those discussions have taken place at all, Your Honor. This is premature. The court set a clear framework for discovery for aggregate estimation. The parties should negotiate as encouraged by the court on this issue of the abandoned claims or non-viable claims.

And, Your Honor, we now only need look back to their information brief to see where this is going if the court grants a bar date now. They say in their information brief that was filed way back on June 7:

"After proof of claims have been filed, Garlock will move to consolidate, under Federal Rule of Civil Procedure 42, claims that have a common question of law or fact and then move to disallow claims that are

not supported by evidence. The proofs of claim and questionnaires will provide the medical and exposure evidence necessary to test the claims. During this process, Garlock will move to exclude any scientific or expert evidence offered to support these claims that does not meet the standards of *Daubert*. Evidence proper to show that a product caused a disease will not be admissible unless there is an established scientific connection between the exposure and the illness."

And then they go on to explain, which is the perilous path that the FCR has been concerned about, and I know the court is concerned about:

"Both allowance and disallowance of claims against the estate and estimation of claims generally constitute core proceedings. There are, however, special jurisdictional rules of personal injury, tort and wrongful death claims. Early in the case Garlock will, in conjunction with its motion to establish a bar date, which it's renewing, and case management order propose an appropriate division of oversight of such issues between this court and the district court."

Your Honor, you will never reorganize this case if they go down this path. I request that the court deny their

renewed motion without prejudice. They can come back to the court again after we have gone through all of these issues that the court has set.

Thank you.

MR. CLODFELTER: Your Honor, may I be heard briefly?

THE COURT: Yes.

MR. CLODFELTER: Thank you, Your Honor. I am going to stay away from the merits of whether the motion should be allowed or denied. I want to talk about the "without prejudice" part of the ruling, and say that what we really are here about today is to get a final disposition of the motion, be it denied or allowed, and I want to talk very specifically about why that disposition is material not for purposes of allowance or disallowance, or estimation, but why it's material to the task ahead of the parties in the next few months about preparing and formulating the plans of reorganization. Again, I want to try to speak as much as I can not in generality but concretely.

The court will recall that in November we learned that in the debtors' database there are approximately a hundred thousand records, and I am going to be very precise about that. Those are records in the database that may or may not indicate that there is an asbestos claim out there alive in the world. Those are records in the database. Over a hundred thousand of those the debtor had no evidence in the database of any

activity with respect to that possible claim for over five years. In some cases, decades. So we now have the database, which is what we had then. Now it's work to clean it up and, as I said in my earlier remarks on the exclusivity motion, we have already learned, in trying to go back out and do some research on that, that already substantially the number of believed to be active mesothelioma claims, not the hundred thousand but what we thought were active mesothelioma claims, has already been substantially reduced because we have learned they are no longer alive.

Now I am at the task of formulating a plan, and so I have to answer a number of very specific questions. When, for example, I prepare my classification of claims, I might possibly be able to consider plan structures in which claims are classified differently based upon whether there are malignancies or non-malignancies. I need to know are they or are they not malignancies or non-malignancies. I have a hundred thousand records in my database. I am not sure how I am supposed to classify them because I don't even know enough about the accuracy of my information at this point to say that I should put them all in one class or I might be able to put them in two classes or in three classes. It's a plan formulation issue, and a bar date and a proof of claim will give me that necessary information even on a form ten, which is what the debtor has scaled back the current request to.

Apologies. I am drifting into the merits. I will stay away from that. But with the minimal information of a proof of claim and a bar date, I might make a more informed decision about classification of claims.

And then I move to preparing my plan for a confirmation hearing and I have to think about plan feasibility. What am I supposed to do about those hundred thousand records in the database? Do I have to run them through my feasibility analysis or not? Are they alive or not? It's a highly material issue in terms of how I formulate the plan and knowing whether or not I can come into court and say to you this plan is feasible, we have financial resources and can perform. I don't know the universe of who I am dealing with. It's as simple and fundamental as that.

There has been a tendency to confuse a record in a database with a claim and that is an error we cannot make. It is why we are at a point in the case now where we really just need to get closure on that issue. We need to know whether we are going to get closure on that issue, with respect. We need to know whether we are going to get closure on that issue because it will inform how we go forward and think about some of the tasks in preparing the plan.

If I am going to do my best interest analysis – we have had a lot of discussion about that this morning under (a)(7) – we need to know, again, what do I do about that

hundred thousand. Do I have to consider them in a best interest analysis or not? I just need to know.

And if I am going to be told that I won't have proofs of claim in order to help me inform that decision, then that leads to very different tasks ahead of us in putting that plan of reorganization together.

Again, that's all I want to say. It's material to the task at hand and for the parties in this case who all face the same task, whether they be creditor plans, parent plans or debtor plans, as I said earlier, and I am not arguing the merits of the motion. I am arguing that the court remove the "without prejudice" and give a dispositive ruling at this point so we know what is the shape of the task ahead.

MR. SWETT: Your Honor, if I may.

THE COURT: Go ahead.

MR. SWETT: We suggest that the correct approach is to deny this without prejudice following Judge Fullam's lead on how to proceed in stages. The debtor has illustrated to you today the extent to which they can use their available data in order to make inferences and present what they believe to be facts concerning the scope of their liability. They have, by using their available resources without one iota of discovery, they have decided that twenty-five percent of the mesothelioma claims aren't really mesothelioma claims, but we can dispute that and debate that based upon the available data, but the

point is they are at no disadvantage in terms of plan formulation, given the extent of the information they have both in their database and in their litigation databases and in the files they have accumulated over the years in all of that process.

What Judge Fullam said on a similar issue, the issue there was are we going to have medical discovery of a hundred thousand non-malignant cases in the mid 2000's, and he said let us begin with what is known and with the information that we already have, and we will proceed to hear an estimation on that basis and, if it turns out that there are issues that would benefit from more factual development at that point, we can always commission those inquiries then. There is absolutely no need for plan formulation purposes to call down upon the heads of the parties at this stage all of the individual disputes, and doing so will tend to make the estimation irrelevant.

We will be embroiled in a world of individual asbestos disputes which, as we have argued in the past, have no acceptable way of being concluded in bankruptcy proceedings. Ultimately there are jury trials held in the district court. That's just not a viable approach. There is no need to stir up that wasp nest at this stage. Nor is there any need to decide today that you will never do that for any purpose. You may well decide in the end that there should be temporary allowance process and that the ballots can be proofs of claim. You might

decide that for some particular purpose it would be useful to have a proof of claim at a later stage in the case.

Judge Wolin's provisional or I should say preliminary ruling about estimation in the USG case shows the wisdom of this approach. He said, "Look, if the cancer claims alone are enough to extinguish equity, then the debtor-in-possession has no interest in the question of what the non-malignants are entitled to. So let's focus on a cancers only estimation and we will make progress on that issue that will clarify whether or not we have any fact-finding that we need to do concerning the non-malignants."

Here a similar issue is arising in a slightly different posture. We should take this at stages lest we overwhelm the case with too many disputes and too many fights going on at the same time to bog the case down and to prevent progress.

I can tell you that, as far as the non-malignant claims are concerned – that's the hundred thousand that Mr. Clodfelter referred to – a statistical analysis of the debtors' database would indicate that, consistent with their history in the last five years before bankruptcy, those claims account for a relatively modest slice of the overall liability, somewhere between nine and twelve percent. It shouldn't be a driver of the action at this point. It is going to, in the end, be a secondary or even a tertiary issue and, depending upon what the

estimation shows, it may not even be necessary to get to it. So there is no need to anticipate it.

But at the same time, you should not be mouse-trapped by the bid to lock in a ruling, bar date, yes or no, for all time and all purposes at this stage of the case. There is no need to do that. It would not be sound or wise judicial administration. What you should do is deny the bar date, again without prejudice and we can revisit that in the fall after they present their plan.

Thank you, Judge.

MR. CLODFELTER: Your Honor, would you indulge us very briefly again? I want to say again the point here for a proof of claim at this stage of the case is independent questions of valuation for estimation.

I just want to talk again about plan mechanics. We will need to know – the debtors need to know, excuse me. I have gotten a little invested in this. I think we are investors. I think it's right. We are the investors. The debtors need to know, in preparing that plan and formulating that plan, do they have to get fifty-one thousand "yes" votes in order to have an accepting class; do they need thirty-three thousand, eight hundred and seventy-eight to have an accepting class; do they need fourteen thousand, three hundred and twenty-one to have an accepting class, what is that target. It has nothing to do with value. I am not talking value now. I am

just talking the raw numbers in order to meet the class acceptance and, you know, that may determine how they put the classes together in the first instance. It may be highly material to know do I think I can sustain a classification here and can I get an accepting vote. You can't know that if you don't know who the claimants are. It has nothing to do with value.

Now, value questions enter in. I am not saying they don't enter in, but I am talking that there are issues here that cannot be obscured by constantly talking about aggregate estimation. They are fundamental mechanics of the code, and we simply need to know are we going to be able to rely upon the fundamental mechanics of the code as we prepare plans of reorganization and try to solicit acceptances or will we be using a very different mechanic.

MR. MILLER: Just to follow along very quickly with what Mr. Clodfelter said, perhaps a different way that we could frame up the ruling that we are asking for is whether there will be a bar date that will permit proofs of claim to be filed prior to the end of the debtors' exclusivity period. That might be another way to get at it. That's all I have to say.

MR. SWETT: That doesn't change anything. I am sorry, Jonathan. Please.

MR. GUY: Your Honor, the practical problem I have with all of this is the debtors filed a pleading with you last night

that said on or before Monday, October 31, 2001, the debtor shall file a proposed plan and disclosure statement and then they say – they ask that the court set an estimation trial in the future, presumably at some point in 2012. This is all reversed. They are saying they want to file a plan and then have an estimation hearing and then at the result of that estimation hearing they can decide whether to convert the case or not. It doesn't make sense. Creating all of these additional hurdles and expenses and delays, they are not going to move us towards reorganization.

If the results of the estimation hearing determine that the debtors are insolvent, then the TDP should be the document that determines who gets paid and how. It's as simple as that. They don't need this information to classify unsecured creditors, asbestos creditors.

Thank you, Your Honor.

MR. CASSADA: Your Honor, I need to just make a couple of points and that is, if what we are about here is just estimating mesothelioma claims, then we need not only to know whether there are proofs of claim for plan – actually the formulation and drafting of that plan but also what we are going to need estimating when you have an estimation trial. And the question is are we going to do an aggregate estimation of mesothelioma claims without proofs of claim and which we are going to be estimating who might file a proof of claim and then

what those values might be or are we going to be doing an estimation of the allowed amounts of claims which the code requires which require proofs of claim.

And to reiterate, aggregate estimation without proofs of claim is what has been done in connection with consensual plans when the debtor and the asbestos committee and the FCR have reached an agreement and that's also – I mean, they say, well, we will have a proof of claim just for voting purposes. It may be that you agree with that and there is not going to be proofs of claim for any purpose except that but we need to know that today. We are progressing toward an estimation trial. We need to know whether the court is going to be estimating claims of claimants without proofs of claim or whether the court is going to be estimating records in the claimant's database that might be proofs of claim or might not be or whether the court is going to be estimating some other kind of liability.

MR. SWETT: Your Honor, those records in the database have been good enough for Charles Bates to make estimates for financial reporting purposes for a long time. This is all window dressing. They are just scheming to try and get closer to the allowance proceedings that they wanted from day one. You said they shouldn't have those, at least not yet. There is no reason in these new arguments to change the ruling, that now is not the time for any bar date and without being boxed into a position for a future administration of the case.

THE COURT: I am going to stick with the existing ruling, with the "without prejudice" part of it, because I don't think, other than the fact it's May 12th, there is any reason to go forth with that now. I don't think it's appropriate for me to decide it one way or the other at this point.

Where I think we ought to head to is an estimation of the debtors' liability, primarily the mesothelioma liability, and that ought to be the next step we get to and hopefully we will be able to get there sooner rather than later and that will depend on the discovery and what kind of responses we get to that and on what time table, but hopefully we are going to get to that and then we will know better where to go after that.

That will be my ruling.

MR. CASSADA: May I ask for a clarification?

THE COURT: Yes. Go ahead.

MR. CASSADA: Would I take that to be that we are going to get to a determination of that without proofs of claim?

THE COURT: Yes.

MR. CASSADA: Okay. Thank you.

THE COURT: At least that's my feeling today. Now, I may change my mind on that but, you know, in terms of where we are headed, I think that's where we are headed. We will just have to see about that. I mean, if we get absolutely no

responses to the questionnaires, then we may have a different scenario than if you get, you know, a good response to the questionnaire. We just don't know that today and I am not prepared to make those judgments today.

Why don't we go to lunch, or do you all want to just keep going?

MR. SWETT: It's a fine time for a lunch break.

THE COURT: It is a little after noon. Do you want to just come back at 1:15?

MR. CASSADA: That would be fine with us, Your Honor.

MR. SWETT: Perfect. Thank you, Judge.

(Recess from 12:04 p.m. until 1:16 p.m.)

(CALL TO ORDER)

THE COURT: Have a seat. All right. Where do we want to go next?

MR. CASSADA: Your Honor, I believe there are two additional matters on the record today. One is the completion of the personal injury questionnaire and follow-up on the e-mail from the court regarding the posture on two issues, and then our motion for past claims discovery.

THE COURT: All right.

MR. CASSADA: Mr. Worf will be making both of those presentations.

THE COURT: Okay. Good.

MR. CASSADA: Thank you.

MR. WORF: Good afternoon, Your Honor. I have passed out a few documents, a presentation that I am going to be speaking from, as well as an exhibit book. We are only going to introduce two new exhibits, one of which is the presentation I am going to make, and then we also have a revised version of the questionnaire which is going to be GST 155 that we have drafted in an attempt to meet some of the court's concerns as expressed in the e-mail a week and a half ago.

I think that, after numerous hearings, we are getting very close on the form of the questionnaire. We circulated yesterday a copy of the questionnaire that embodies what we viewed as the court's rulings on everything except the two issues that we are discussing today. We circulated that yesterday and of course did not expect a response from the committee or future claims representative before today, but that process is underway and I don't think that those areas are going to be controversial at all.

We appreciate the opportunity today to address the two areas that were the subject of the court's e-mail of a week and a half ago and I think those are two fairly narrow areas and they are the questions regarding the Garlock exposure and the questions regarding the claimant's exposure to other asbestos products.

And the way I want to approach those is, first of all, to explain the debtors' need for those items and how they fit

into the debtors' estimation case and, like I said, I am not going to introduce any new exhibits. I might refer to some of the past ones, and I also want to refer to some of the testimony from Mr. Glaspy and Mr. Simon to help to explain the debtors' need.

And then for each of those topics, I am going to discuss the court's concern regarding coding, and we have drafted new questions in both of those areas in an attempt to meet that concern and bring some standardization to the responses to those questions.

So hopefully we can show the court that the debtors can get that information while still getting it in a somewhat standardized form.

Just to recap what we think the scope of discovery is, we presented at the last hearing debtors' rubric for their legal liability estimation case, and the court expressed a willingness to hear the debtors on that case and to allow reasonable discovery that is relevant to that case. And the basic approach is, as the court heard, the estimated liability for a group of asbestos claims is a function of just a few factors and, starting on the right side at the bottom, it starts with what the expected value of a judgment is and the judgment in that jurisdiction for that kind of injury, and then you have to determine what the allocation to co-defendants would be to determine what the potential exposure for Garlock

at a hypothetical trial would be and then multiply that by the probability that Garlock would be found liable and by the number of claimants who are in that group.

So that's the rubric. And the information we are discussing today is mainly relevant to the second listed factor there, which is the probability of Garlock liability. The other exposures are also relevant to the allocation of co-defendants as I will discuss.

Now, the court's e-mail, one of the reasons for the court's decision regarding Garlock exposure and the other exposures was the court's impression, and Mr. Glaspy had testified he did not need that information in order to settle a case. So I wanted to remind the court of the link between what Mr. Glaspy testified regarding trial risk and the likelihood that Garlock would be found liable at a trial and settlement values.

As the court is well aware, the debtors don't think the standard at estimation is what Garlock would have had to pay to settle the cases, and they also think, for reasons that have been well aired, that the settlements from 2000 to 2010 do not fairly characterize either what Garlock would have paid in the future to settle cases or Garlock's legal liability for claims, and I won't get into the details of that. I think the court is well aware of our positions on that. But I do want to point out that Mr. Glaspy in his testimony about what

settlement – how he would value the settlement value of a case, and I apologize for the writing here being so small so that spectators cannot see, but I might read part of it here. He testified that there is a link between trial risk, the risk at a hypothetical trial, what our legal liability approach is trying to model, and what the settlement value of the case is. I think that's important to understand. And in this testimony he testified that all of the factors in our equation have something to do with the settlement value of the case. And just to quote some selections:

"Yes, my job was" – well, Mr. Cassada asked him:

"Would you agree with Mr. Simon's statement on page 67 of his transcript that, quote, the risk of trial is what drives settlement, end quote?"

And Mr. Glaspy said, "Absolutely." And then he went on to explain that, when he is evaluating the risk that Garlock faced in a particular case, it depended on the expected jury verdict in that jurisdiction; the allocation that would be made to co-defendants which depended on settlements and also the allocation scheme of that jurisdiction; and then finally at the end of the page there, the likelihood that Garlock would be found liable.

Now he testified also that settlements are motivated by other concerns, which we have gone into, the cost of litigation and also he testified extensively about why the 2000

to 2010 settlements, due to the temporary absence of the culpable bankrupts, did not fairly adjudicate Garlock's liability when it was settling cases. So that's an important caveat, but this is just to point out that there is a link there and, if the court wants to limit the questionnaire in the way that the e-mail suggested, it still has to keep in mind what Mr. Glaspy testified about the trial risk.

So going on to the particular questions that we are concerned about here, the first deal with the particulars of the Garlock exposure and, just to recap where the questionnaire stands, if the court sticks to the e-mail from last week, it would require the claimant to identify the products, the Garlock products that he or she was exposed to, and then would require the claimants to fill out the check boxes saying whether he or she personally cut gaskets, personally cut packing, personally removed gaskets, personally removed packing, was at a site where Garlock or Anchor asbestos containing products were cut or removed by others, or worked in or around areas where Garlock or Anchor asbestos containing products were cut or removed by others.

Those are important questions to us and we are obviously glad they are in the questionnaire. We don't think they go quite far enough, and I want to describe why by reference to Mr. Simon's testimony.

The basic contour of any asbestos case is that the

plaintiff is trying to prove that he or she inhaled asbestos from a Garlock product that was a substantial contributing factor in causing his or her mesothelioma. And what happens in these trials is that experts for the plaintiff and the defendant come in and they testify about two things. First of all, about how much asbestos from the products the plaintiff could have been exposed to, given what the plaintiff did with the product and then, secondly, whether that exposure was a substantial factor in causing a dose sufficient to lead to the disease, in this case mesothelioma.

Now, plaintiffs have encountered the Garlock product in a lot of different ways and there were some plaintiffs, as the questions might suggest, who were out there alleging that they were cutting gaskets or removing gaskets and there were some plaintiffs out there who were alleging, no, I didn't do much of that, I was just in a site or in an area where other people were doing those activities. Some people were even more remote than that. They were just in a factory or a big shipyard or somewhere like that where they know the Garlock product was present but they didn't have any particular association with the product.

And then even among those groups are differences. So there might be people who cut one gasket in their career. There might be people who that's all they did for many years. There's just differences among those groups and that matters in

determining what the likelihood that Garlock would be found liable in a particular case. I think Mr. Simon's testimony illustrates that pretty well.

Now, the debtors would no doubt disagree with Mr. Simon about where the line is between a strong Garlock case and a weak Garlock case from the perspective of a plaintiff, but it is clearly an issue and is part of the terms of the debate between plaintiffs and defendants and it has an impact on what the value of the case is. So he testified – the question was:

> "Now, in a case where you are proceeding to trial against Garlock in a gasket packing exposure and against some array of other defendants on those other kind of products you described, what disadvantages, if any, did the plaintiff's case against Garlock have by virtue of the combination."

And he testified:

> "Well, the quality of the gasket case, for example, depended significantly on what did the claimant do with the gaskets. That is to say that, if you are talking about gaskets in a setting, you know, like a heat transfer setting where the gasket would degrade and become stuck to both ends of a pipe flange so that the gasket residue had to be removed through heavy action, then there were no particular disadvantages in a gasket case except for the fact that Garlock was

represented by very skilled trial lawyers who knew their business. If on the other hand you didn't have that kind of case, your case was" - and I emphasize this - "just primarily installing precut gaskets or very little removal or if the case was where the gasket was in an ambient air setting so that the gasket wouldn't really stick to the flange and therefore it wasn't really necessary to put real exertion in getting the gasket off, then that is, you know, a lower exposure gasket case and a disadvantage not just because those particular facts are not compelling from the standpoint of exposure but because the Garlock lawyers were very skilled at pointing out those deficiencies and comparing them to other exposures that they would argue were more prolific."

So here you have a very experienced plaintiff's lawyer admitting that there were Garlock gasket cases that were not very compelling because of the circumstances of the exposure, and that is what we are trying to get at with the questionnaire and the questions that follow the checkboxes about how the claimant was exposed to the product.

For instance, as the question stands right now with the checkboxes, someone who just cut a single gasket in their career would be able to check that he or she personally cut asbestos containing gaskets, and that wouldn't tell us very

much about what that claimant's exposure to the product was. That's why we had the follow-up questions about how they removed the gaskets and some estimate of how many times they did it.

Going on to the next slide, I won't read all of these but Mr. Simon went on and said that's our case, that if a person is using this heavy mechanical action on the gasket of a hand wire brush, a power wire brush, a disk grinder, and he went on to say that's the kind of case that he liked to see. So with the questionnaire, we are trying to figure out how many of those cases are out there.

The next slide, he went on, in bold there, he says that – here he is talking about his account of what settlement negotiations with Garlock were like. And at least according to him Garlock was interested in, in other words, did he work with a lot of gaskets or not; did he remove the gaskets this way or not. Again, Mr. Simon admitting that that was a factor when Garlock was settling cases.

The next one, he says:

"In what I would call a good Garlock exposure case, which Garlock's lawyers disputed ever existed, where somebody was removing gaskets from an adhered flange with heavy action and did that a lot in their professional career..."

So they did that a lot. Again, the numerical element of it.

And then the next one:

"What they did is important."

This is Mr. Glaspy. I apologize. He was talking about how he went through and valued cases, and he said:

"What they did is important. Did he actually use gaskets throughout his working career; or was he working in insulation and somebody else was using a gasket down the way? So there are a lot of plaintiff-oriented criteria that would enter into a case and each case is different."

I should have said earlier this is all a function ultimately of state law and the fact that state law recognizes that – at least many states do – that the duration, the frequency and proximity of exposure to an alleged asbestos defendant's product matters. And in our summary response to the committee's information brief, we cited some of these cases last year, and I will just read from one of them where the Supreme Court of Pennsylvania said:

"We recognize that it is common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease. Such generalized opinions do not suffice to create a jury question in a case where exposure to the defendant's product is *de minimis,* particularly in the absence of

evidence excluding other possible sources of exposure or in the face of evidence of substantial exposure from other sources."

And that citation is *Gregg v. V-J Auto Parts Company*, 596 B.A. 274.

So the nature of the exposure really matters and that's why Garlock put it in the questionnaire and why it's important for debtors as they craft their expert's opinions on estimation.

So let me go to what we propose to put in the questionnaire to replace the question we had before, and I have got a summary of this on the next slide. This draft is attached as GST-155. The open-ended questions about the cutting and removal of gaskets, we have eliminated entirely. We have taken those out, and we have replaced those with fairly discrete questions about how often they encountered the Garlock or Anchor product and what they did with the product. So after the checkbox question, we have the claimant respond to the approximate number of Garlock gaskets or quantity of Anchor packing cut during employment at this site, including cutting while installing gaskets and packing. That should be an approximate number, easy to code, and it goes on to ask the person completing the questionnaire how the injured party or occupation of the exposed person cut Garlock gaskets or Anchor packing at this site, and it has them list the method. They

can do that as Mr. Simon's testimony shows. They can say what kind of tool they used to cut the gaskets and this question asks them to quantify the approximate quantity of gaskets and packing that they used that method on.

So if they cut gaskets, that's the only thing they have to answer. Then if they also removed gaskets or packing, it asks them the approximate number of Garlock gaskets or quantity of Anchor packing that they removed during employment at that site, and then it goes on to ask them how they did it and, if they used more than one method, to quantify or make an approximate quantification of how much they did it.

And then finally we have checked the bystander exposure question which was already quantified: If the injured party or occupation exposed person worked in or around areas where Garlock or Anchor asbestos containing products were cut or removed by others, describe such person's regular proximity to such areas in terms of hours per day and days per year.

So those questions will give us a rough idea of what group this claimant fell in, and it will be a substantial improvement over just the checkboxes. And with these discrete questions, we think it will be easy for the experts to code and to process.

Now we showed the court the last time these kinds of questions have been approved in previous questionnaires in asbestos bankruptcies, these sorts of quantification questions,

and one was the W.R. Grace questionnaire and also Judge Wolin at USG expressed an intention to approve questions like that, including the description of how the USG product was used at the site, as well as the nature of exposure and the name of the product, and also in what we have been calling the *G-I Holdings* questionnaire. I understand from Mr. Swett it might be the *G-I Holdings*. It must be a Roman Numeral, I guess, but they also asked specific questions about the quantity of exposure.

So we think that shows it is a legitimate topic of estimation related discovery, as well, and in this case it strikes us as even more legitimate because, as the court heard from Mr. Glaspy, Garlock's record at trial before 2000, when these debtors, *G-I Holdings, W.R. Grace and USG* were also in the tort system, Garlock's record was exemplary and Mr. Glaspy testified that he was nineteen and one before 1998 in cases where he could show that the worker had been exposed in a certain way to a Garlock product and showed the alternative exposures to the other products.

These debtors, their products were far less defensible than Garlock's products. That's why they were, in part, in bankruptcy more than a decade before Garlock was. And they asked these questions and were entitled to receive the information, and I just think, in Garlock's case, Garlock with a product that was just objectively more defensible than their products is entitled to ask those questions, too. And for the

reasons I described, it's important to Garlock's estimation case.

Again, we are not seeking all the details about how they were exposed to the Garlock products. Mr. Simon went into a lot more detail about what the kind of pipe was, what the level of adherence of the gasket to the pipe was. We are not asking any of that. We are just asking the very basic questions about the quantity of exposure, again to group the claimants into the rough categories that we need to put them in to conduct aggregate estimation.

So we would respectfully ask the court to approve our revised form of questionnaire with those discrete questions in there.

The next topic that we wanted to discuss today are the exposures to other asbestos products and just to remind the court where it stands right now, if the court holds to its e-mail from a week and a half ago, the claimant would list the work sites where he or she was exposed to other products and would list sort of the general circumstances of how he or she was exposed to asbestos, which would, I presume – well, it is somewhat vague what that means but that's what the committee's version of the questionnaire says. But it would not give the names of the particular other asbestos products that the claimant was exposed to. And we think that is a significant omission for a few reasons.

The court heard from Mr. Glaspy that the identity of the other asbestos exposures that the claimant had experienced was crucial in determining how much trial risk Garlock had and what its likelihood of success was if it went to trial. And I will just recap some of Mr. Glaspy's testimony on this, and I will do it in a little more detail than I did Mr. Simon's because it is also relevant to the motion that will be heard later today if we get to it.

Mr. Glaspy began by describing what his job was as a Garlock defense attorney and he said very pithily what his task was and he was asked:

"Can you describe what the environment in the presence of asbestos insulating material meant to Garlock in terms of its defenses at trial?"

And he said:

"Trying cases for Garlock over thirty years and talking to the juries, it became very obvious that we were almost always facing a plaintiff who was dying, or his widow, and the jury wanted to know why. So my job was to get up and point at the insulation, the amphibole asbestos, the huge exposures, a proven cause of meso, and give the jury the answer to that question. Then we could explain how gaskets couldn't have caused it."

He went on to describe, at pages 11 to 14 – these

excerpts are all tabbed in the copies of the testimony that I have handed to the court – he describes how the insulation and the other dusty products were fundamentally different from Garlock's. The court may recall that he had an example of a Garlock gasket up there. It was hard. It wasn't an asbestos containing gasket. It was, I believe, contained Kevlar or some other fiber but he said it was identical in appearance to a Garlock asbestos-containing gasket and it was hard and couldn't be crumbled to the touch, and he described that the insulation was very different and how it was dusty just when you touched it.

He went on to describe how successful Garlock was when it could point to the insulation and the plaintiff's exposure to the dusty products and how Garlock was less successful when it couldn't.

He was asked:

"Was, then, Garlock's trial risk in a given case influenced in large part by the number of co-defendants whose products were identified in a case?"

He answered:

"Absolutely."

"And was Garlock's trial risk profoundly affected by identification of the asbestos insulation products that you have described before?"

"Yes, and for two reasons. One, like I said, the way

to defend a case was to tell the jury what caused the injury and, if you couldn't point at that friable asbestos insulation, you had a real problem. And, secondly, offsets. If those people are with you, they are going to take a big share of the hit and your client's share is reduced."

"In those cases when you were able to point to and identify the amphibole insulation products, how would you assess the third stage of your settlement process, the risk that Garlock would be held liable at trial?"

He answered again:

"My experience in talking to jurors afterwards is we won because they were convinced that the insulation is what caused the disease. So if we couldn't point at that stuff, we would have been, I think, very unsuccessful.

Q. But if you could point to it?

A. We were fairly successful.

Q. Okay. When the plaintiffs admitted they were exposed to asbestos insulation, when a plaintiff itself admits that, what effect would that have on Garlock's trial risk?

A. Well, it made my case, my job, very easy because, if a plaintiff admits that all of that material was present and he was exposed to it, I had met my burden

of proof."

And then he went on to describe how he personally was nineteen and one defending Garlock before 1998 and how in the one case the share of liability assessed was between two and five percent.

He went on to describe, at pages 23 to 29, how other exposures matter because other exposures mean other settlements and other settlements mean that Garlock is protected from the plaintiff's damages if it went to trial. He described two cases, the *Duncan* case and the *Firth* case that were handled by Mr. Simon's firm. In the *Duncan* case when it became clear that the settlements exceeded the possible verdict, the plaintiff's attorney packed his bags and went home.

And in the *Firth* case, the jury assessed liability against Garlock but it was a take nothing verdict because the settlements exceeded the jury's verdict. So the other exposures were relevant for that reason, as well.

At pages 33 to 34, he testified again that before 2000 there was a low level of risk for Garlock because the plaintiff would identify the insulation exposures and it, quote, made the case a whole lot easier.

At page 36 to 37, he said that bankrupts were routinely – the future bankrupts were routinely identified in Garlock cases before 2000.

Pages 39 to 43, after the bankruptcies started in

2000, the plaintiff's identification of those products increased dramatically, and he testified that there was no practical way for a defendant to prove the exposure when the plaintiff didn't admit it. According to him, the plaintiffs controlled the product ID evidence. And when asked whether from the work sites alone it would be possible to prove that the plaintiff was exposed to a particular insulation or other high dose product, Mr. Glaspy testified that that was not practical for various reasons.

He went on to describe the impact that trusts could have on the situation. At page 52 he described how plaintiffs identifying trust exposures in order to get trust payments would have the potential of increased trial risk because you would be back in a situation like Mr. Glaspy was in before 2000 when plaintiffs were admitting the evidence and had developed it and Garlock, if it went to trial, would be able to point to that evidence.

At 52 to 55, he described how offsets from trust payments would increase trial risk and, if the aggregate amount of those payments were one point two million dollars, it would, quote, be like the old days where others were picking up most of the plaintiff's expected damages.

Page 57 to 60, he described again how the lack of identification of other products contributed to a worse record at trial after 1998, and he described how that played out in

the *Treggett* case that he handled, which was Garlock's - the largest verdict that anyone obtained against Garlock.

And then finally at page 97 he described how, without the plaintiff's help in identifying the exposures, it is not possible for a defendant to link a product, a particular product, to the plaintiff and to their breathing zone because it is, quote, like a needle in a haystack.

MR. SWETT: What page is that, please?

MR. WORF: That is page 97.

Mr. Simon also testified about the importance of other exposures in assessing trial risk. He was asked:

"Can you describe for the court your experience and how it is that an asbestos defendant goes about trying to make the case at trial that its product is less responsible and should avoid damages or should be lower damages than another defendant's or non-party's asbestos product?"

And he answered:

"In two ways. One through trying to establish that their product is not a substantial factor in causing the disease claimed but rather other products are. The notion that other products were more prolific in this claimant's asbestos exposure. Other products contained forms of asbestos that, you know, Garlock would characterize as more potent and more significant

in how this person got mesothelioma and how people in general, when they develop asbestos related mesothelioma, get it."

And that was at page 66 of Mr. Simon's testimony.

Then on cross-examination, at page 152, Mr. Simon was asked:

"Q. Let me take you back to the same fact pattern that we were talking about a moment ago where we have a number of defendants against whom all we have compelling evidence of exposure for all of the defendants. The more of those kinds of defendants there are, the lower any single defendant's risk in a joint and several state, correct?

A. Same exposures? Do you see what I am saying? You know, thirty-nine proven, fairly attenuated exposures, two significant product exposures, you know, it is sort of fact specific. It is hard to answer generally.

Q. So it depends on the level of exposure to each of the alternative defendants, to each of the co-defendants?

A. That's certainly a determinative factor which would affect trial risk, for sure."

So back to the questionnaire and the debtors' need for identification of other products, as the questionnaire would

stand under the court's e-mail from last week, we would get the work sites but we would not get the names of the other products that the plaintiff was was exposed to. And for all of the reasons I have described, the names of those products are really quite important. They will tell us whether the plaintiffs today are admitting their exposures to the kinds of products that Garlock used to defend itself at trial before 2000. And Mr. Glaspy testified extensively regarding the importance of that and his ability to point to those products and how trial risk after 2000 went up significantly because those products were no longer identified.

So in assessing whether today's claims are more like the pre 2000 claims or more like the 2000 to 2010 claims, it's important to know are those exposures being identified. And we have reason to believe they are. Plaintiffs are making trust claims. They are having to identify exposures, and they can tell us whether they have identified those exposures, and that's an important fact to know.

Are the work sites enough? Well, Mr. Glaspy testified no. He knew the work sites between 2000 and 2010, and that wasn't enough because, as he testified, he has to have the plaintiff identifying the exposures for it to matter, and that's what the debtors' question on the questionnaire is directed to, are the plaintiffs doing that now, are they admitting their exposures to the other products.

For the same reason, you know, under the questionnaire as it stands, we will have the identity of the defendants that the plaintiffs have claimed against, as well as whether they settled with the defendants or not and the same for the trusts. But that is not enough either because those facts don't show that the plaintiff was admitting that he or she was exposed to the product. And, again, it is important to know that for all of the reasons that Mr. Glaspy and, indeed, Mr. Simon admitted.

So in light of the court's concern, we asked ourselves is there a way for us to take away some of the indeterminacy as they stood before and make it so it is more easily coded and more standardized, and we have tried to do that and here is what we did.

First of all, at the last hearing, the court said that it preferred the committee's separation of part five into parts 5(a) and 5(b). 5(a) for Garlock exposure and 5(b) for the other products' exposure. So we have done that.

Part 5(b) per the committee's proposal requires the claimant to identify the work sites where he or she was exposed to the other products and also, per the committee's proposal, includes the question about the circumstances of exposure. The questions in part five that we had before about the name of the products, the name of the other products, the name of any contractors who installed other products on the site and the name of any equipment manufacturers who installed - any

manufacturers of equipment that was on the site, and we have eliminated those, as well.

We have replaced it with, in tables (a), (b) and (c) where the plaintiff identifies the defendants and trusts against which the claimant has asserted claims, as well as the status of such claims, we have added a single question, "Have you ever admitted exposure to a product for which this defendant is responsible?" And the claimant would answer yes or no.

THE COURT: Do you have that in the -

MR. KRISKO: Your Honor, there should be an exhibit book to your left that is tabbed to - is it 155?

MR. WORF: That is right. It is GST 155 and it is table (a) and it is also in (b) and (c). I see some of my lines have disappeared in table (a) but we can replace those. But it asks, "Have you ever admitted exposure to a product for which this defendant is responsible?" And the claimant just has to answer yes or no, and that is something the claimant knows. We are not asking about exposures that have not yet been investigated. We are just asking simply whether that claimant has already admitted exposure to a product for which that defendant is responsible.

How might a plaintiff do that? Well, it's common for plaintiffs to have been deposed. It is common for plaintiffs to execute affidavits of exposure when they are settling claims

with other defendants, and these are all facts that the claimant knows about whether or not he or she has done that. And it goes directly to the facts that Mr. Glaspy and Mr. Simon testified were important about whether those other exposures were admitted.

And then finally simply answering yes or no about that particular defendant doesn't quite get us all of the way there because, for instance, some defendants manufacture multiple products and we won't know just from that yes or no whether, for instance, if a claimant settled - if the claimant had a claim against the Johns-Manville trust and had admitted exposure, we wouldn't know what kind of Johns-Manville product he or she had admitted exposure to, and that is important again as Mr. Glaspy testified.

Now this doesn't ask the claimant to answer that question or provide the answer to that question in the questionnaire but, in order to fill that gap, if it becomes necessary and important to the experts, we have asked the plaintiff to attach to the questionnaire, first of all, the plaintiff's deposition; second, any affidavits of exposure that the plaintiff has executed admitting exposure to any product; and finally the trust claim forms that that plaintiff has submitted which would contain any admissions of exposure to that trust's product, as well as in the case of many or most of the trust claim forms, the identity of the product the

plaintiff was exposed to.

So we relieved the plaintiff – the claimant of the burden of putting that information in the questionnaire but we asked for those attachments which the claimant obviously has to fill that gap if it becomes important to the expert's analysis.

So that is our new approach tracted to make some attempt to address the court's concerns.

Again, at the last hearing we talked about how this was a topic of discovery in previous estimations in asbestos bankruptcy cases. We showed the court the *W.R. Grace* questionnaire and the *G-I Holdings* questionnaire and they all had far more extensive questions about exposures to other products, including requirement in both of those that the claimant quantify the extent of the exposure to the other products, some quantification of the dose of exposure. We don't have that. We have less than those questionnaires have. We just want to know the names of the products that the claimant has admitted exposure to and then get copies of documents that may go into more detail.

So we think the request is quite reasonable and especially given the issue of other exposures and other defendants and the impact that had on Garlock's claim history between 2000 and 2010 is one of the central issues in these cases and, to my knowledge, it was not nearly as central in these previous cases where issues such as the validity of

medical evidence supporting nonmalignant claims was, to my mind and what I know of these cases, the more pressing issue, yet these debtors got to ask more extensive questions than the debtors are even asking for.

So we think it is reasonable and we think that the new proposal provides a way to reduce subjectivity and any coding that may take place. The claimant will provide, right here in the charts, whether or not he or she admitted exposure to those products, and it is important for all of the reasons that I have discussed.

Finally just one point that I skipped over is that Mr. Simon testified extensively about how this evidence is discoverable and how it is his obligation to provide what he knows in tort system discovery about what the other exposures are and the references there are pages 133 to 134, pages 135 and 136 and pages 158 to 159.

On page 136 he said, "I have a responsibility to answer discovery according to the understandings that I have about the alternative exposures." So we think it is proper discovery. We think that the new proposal provides an efficient way to get the information, and we would respectfully ask that the court accept our attempts to meet the court's concerns regarding both the Garlock exposure and the other products exposure. Thank you.

THE COURT: Okay. Mr. Swett.

MR. SWETT: Your Honor, we are confronted with a drastically new approach. I am going to urge that you stick with the rulings you have made so that we can move forward and not have to continually reargue things.

We have a form of questionnaire that we have marked as ACC Exhibit 103 that Ms. Kelleher will now distribute which reflects the court's rulings as we understand them and would represent the state of play in light of the modification of your ruling by e-mail the other evening, if we have understood you correctly.

So that, for example, in 5(a), and we have 5(a) and 5(b) as you suggested, the claimant would be called upon to check boxes characterizing in that limited fashion the kind of contacts they had with Garlock products and, if it doesn't fit within those boxes, they would be called upon to make an explanation. All of this would be subject to the option the plaintiff would have of supplying the documents that represent the plaintiff's knowledge or information concerning these circumstances.

As you see at the beginning of 5(a), there is a check the box if you are responding by attaching documents in lieu of filling out part 5(a) of the form. This is structurally borrowed from the Bondex form.

So we believe that 5(a) as set forth here reflects your thinking as you expressed it in the e-mail the other day

and likewise, with regard to 5(b), the other exposures, the non-Garlock exposures, I believe your ruling was that the committee's proposed approach to that would be accepted and this was that.

This differs from what the Garlock folks are now proposing in very important ways. The significant impact of each of the changes that the debtors are proposing would be to magnify the plaintiff's burdens, which have to be evaluated in the context that a relatively small number of law firms are going to need to be working on five thousand, five hundred of these at the same time and what will be, by any measure, a fairly truncated period of time, while at the same time responding to the Bondex form, which is another five thousand or so claimants. The idea that in the tort system at any time any particular law firm would be called upon to develop the product identification information out of its files for purposes of written discovery at the same time is unthinkable. It just wouldn't happen. It will create significant strains on the law firms as I am sure, if the form goes out in the manner that they suggest, you will hear from folks who have much more direct experience in that than I.

But you shouldn't minimize the goal that you articulated in the e-mail of balancing reasonable need on the debtors' side against the difficulties of response and all that that means on the claimants' side. The debtors, I submit,

don't really know the meaning of balance. Every time they modify their form, it gets more onerous, not less. Every time we come back, they have some other detail that they want to elicit.

What has been missing from any of their presentations is any assertion, much less any demonstration, that in the tort system in the average case they did anything like this level of detailed discovery of a particular claimant's information, whether it be to exposure or otherwise. They didn't.

The evidence that you have in front of you is that very few cases proceeded to trial. Admittedly where they did go to trial or on a situation where they were headed to trial and on the brink of it, before they settled, their discovery was indeed aggressive. Those are relatively few cases as we understand it.

You have seen that, in the case of The Simon Firm, which was a trial oriented firm, after a decade of crossing swords with The Simon Firm in mesothelioma cases, finally the suggestion that they make a general understanding about how to resolve cases in broad categories finally made sense to Garlock and, in the last several years before the bankruptcy petition, that's how they were dealing with The Simon Firm's clients.

You also saw the Simmons Firm, which had, instead of a litigation track to settlements, it had what we would call an administrative or a processing track where Garlock essentially

set a budget. It knew roughly how many mesothelioma claims the Simmons Firm would present every year. It knew how those cases, roughly speaking on average - and I emphasize again it is the average that drives the estimate. It is not the particulars of an individual case. And they knew what the average case would look like and they made a budget. They knew they would have to resolve those cases and they figured out that the most effective, most cost-effective way to do so would be to arrive at a general understanding with the firm about a framework for settlement without litigation, and they did no discovery, much less any discovery on this order of detail.

So the first thing I have by way of a substantive objection to this is that on the record what they are asking for now far exceeds, far exceeds the level of discovery that they usually took in the tort system when they were actually litigating the claims. Ironically, aggregate estimation, if they had their way on these details, will have become a vehicle for more intensive claim by claim discovery of mesothelioma claimants than allowance proceedings if they followed the model of the tort system would. It doesn't make any sense, nor is it necessary.

The evidence from last fall and through both of the lawyer witnesses who testified is that this is a mature tort. This was litigated for thirty years. Not only was it a mature tort system-wide, across all defendants, but it was a mature

tort as far as Garlock went, as far as Garlock dealt with the cases and the lawyers, and it did not require Garlock to make the unreasonable, non-cost-effective decision to engage in intensive claim by claim discovery in every case. It simply didn't do it, so why should they do it now?

The reason now is because they are playing with house money, as Mr. Guy has pointed out. They are less interested in the incremental dollar. They would rather devote the money to an aggressive approach in estimation than coming to terms with the claimants.

Well, that is something we just have to deal with, but it is a factor when you consider the appropriate balance which, as I will argue more extensively later today, is your function under Rule 26. This is gilding the lily. It is not necessary. It will impose inordinate burdens and it shouldn't be required.

It also subverts the proper interplay of the bankruptcy system and the tort system in this sense, and here I rely on Mr. Glaspy's testimony. Mr. Glaspy's testimony was when the plaintiff was an active suit against a large group of defendants or the burden of making product identification against everybody who was in the case by the time of trial and Garlock could sit back and, in a sense, piggyback on the plaintiff's efforts in that regard. But then when the other defendants went into bankruptcy, the array of defendants heading into trial changed. Garlock became more prominent in

that array and the burden, in effect, shifted. Mr. Glaspy flatly admitted in that circumstance now it was his burden to find the other exposures. He called it, "Live by the sword, die by the sword." He called it, "The shoe is on the other foot," because the same burdens that the plaintiffs used to have to bear to make their case against the insulation defendants at the same time as against Garlock were now burdens that he had to bear. He called it, "The search for the needle in the haystack." That is what it was for the plaintiff, too. That is the sense of his testimony. That is what he was telling you.

Now, through the magic of bankruptcy procedure, Garlock is hoping to shift that balance back, shift that burden back onto the plaintiffs. That is not a fair use of bankruptcy procedure.

They have not laid a proper foundation for this discovery in terms of what they generally and reasonably sought in the tort system. Instead they are trying to ratchet up the aggressiveness of discovery and inflict the cost of that and the burdens of that on the plaintiffs or, as Mr. Guy pointed out this morning, purposes of leverage, and that is not appropriate.

Now, a couple times Mr. Worf referred to an effort to standardize so that the experts could code better, and this underscores the irony of what they are trying to do in the

guise of estimation. They want it to be intensively about the individual claims.

Well, they also acknowledge, as did their witness, that all claims are in some sense different. Now, the intensity of the differences or the minuteness of the differences, or the variety of the differences in the wholesale system of resolving the claims in the tort system turned out to not be of primary importance. They could categorize the case broadly according to a few basic categories and price it on that basis. That is the evidence as to what they did, by and large, with the exception of those few cases that they did press to trial.

Here, they want minute detail and they want it in a format that then their expert can code, which is like asking the plaintiff to characterize facts for the benefit of the other side's expert. It is an inappropriate allocation of those burdens.

If they now want to define more minute categories, then they should bear the burden of extracting the information from the raw materials in order to check their boxes or fill out their fields in the way their expert finds more convenient, but it won't give you a clear picture of the tort suit. A fair picture of the tort suit comes from watching the plaintiff testify on the stand to the circumstances of his life, how he came into contact with these products, what it meant in his

daily routine and what the consequences were, and that is not going to come through in checking the box, no matter how many boxes they proliferate.

So they are on, in effect, a quixotic mission to turn fact-intensive, case-by-case, highly individualized disputes into check the box. And yet because, precisely because that is not a feasible cost-effective undertaking in the tort system when they were actually buying these claims, they didn't go about it that way. So their discovery approach here is out of whack. It doesn't fit the needs of the case, and it would impose inordinate burdens.

Now, we know that their expert, Dr. Bates, doesn't need anything like this. We know that because he is the expert in Bondex, and the Bondex case is different and its theories may be different but he is the expert. He will be the guy who makes the estimate. And we know, both from his own history of making estimates and his approach in the Bondex case, that he doesn't require this inordinate level of detail. And frankly speaking, they probably have no sensible way of using it.

If they do, though, they can extract it from the materials that most claimants will opt to produce instead of completing the form. I am not clear on whether their new and improved version of their questionnaire form preserves that option in the same way. It is an essential component of the resolution that where matters stood after your e-mail ruling

the other day was an essential component in getting the parties to agreement in Bondex. It makes a world of difference to the claimants and it should be preserved.

With regard to the third-party exposures, the form that we suggested and, as matters stood after the e-mail, you had accepted, simply calls upon the claimant to identify the work sites where he was exposed to asbestos of other than Garlock or Anchor and to describe, in general, the activity that led to the exposures. This, again, is the approach taken in on Bondex and it is the one that the plaintiffs - I'm sorry - the defendants themselves, through the likes of the Bates White firm, have taken to using when they assess the probability that a given claimant will have a claim against a given trust. As you have seen multiple times, they review the work history that you get from the Social Security Administration. They review the information in their database that they have already accumulated through thirty years of litigation about that work site and what other products were known to be there and they make inferences accordingly, and they can do that here. Mr. Scarcella has testified that takes a few hours. That costs a modest amount of money. Instead they would inflict these burdens and expenses on the plaintiffs through this overly elaborate questionnaire process.

Now, one thing you can be sure of, they are not going to take the plaintiff's word for it. We know that because of

the jaundiced view they take of the plaintiffs generally. And we know that, when they get the questionnaires and the plaintiff, if they fill out the boxes or check the boxes and write out the short narrative descriptions, they then intend to scrutinize that and they are hoping to be able to depict those responses as somehow misrepresentative, and so they are going to do another analysis themselves anyway. They're going to look at the discovery records and the work site lists and all of that material that has accumulated and draw their own inferences. And since you know as a practical matter that they are going to do that, why bother to have the plaintiffs do it for them? It doesn't make any sense.

When I spoke, Your Honor, of their database of work sites and exposure information, I was referring to testimony given by a lawyer named Turlick who is out of Pittsburgh. He was a Garlock defense attorney, which is quoted at length in one of our submissions about the questionnaire.

This new question, which they sort of slide in here subtly in a form that we don't see until the night before the hearing and ask you to accept on the spur the moment, in effect, "Do you admit to exposure to a given person's product?" If that were a request for admission in the civil litigation system, it would probably be objectionable as vague and ambiguous, and they don't define what they mean by admit. They take some things as admissions that the plaintiffs might not

take as admissions, and they are asking the plaintiff to characterize the state of play in a way that is for their convenience but will not resolve the issue because of its inherent ambiguity.

If the plaintiff discloses that they made a claim against a certain entity or a certain trust, whether or not that claim has been settled, then they will, as they would anyway, make their own inferences about that. They will interpret that the way that they think best suits their estimation case. They don't need to be calling upon the plaintiff to express legal conclusions about the state of play on his claim against somebody else other than whether it is pending or has been settled, and that is where matters stood after your e-mail of the other night, Judge, and we submit to you the better part of wisdom here would be to let it sit there and have the parties meet and confer one last time to conform the document to your rulings so that the debtors can then give it to Rust and have it out on the street in a reasonable period of time.

There is one other issue which I'm going to point to. I believe it has been resolved. They evidently take a different point of view. They have requested that as part of the questionnaire claimants be required to complete an authorization that would authorize Garlock to go to all of the trusts and get all of their claim forms even though they are

asking the claimant to identify the claims and the status, and one way the claimant has of doing that is to produce the documents, which could well include the claim form. It is a redundant request. It is an offensive one in this regard:

As you have seen, and as the TDPs that have been put into evidence confirm, the trusts have confidentiality obligations in their organic documents, in the document that controls who they pay and how they pay, the claim submissions and other information are subject to a confidentiality obligation.

Now that doesn't mean that the trust in a tort suit might not respond to discovery of a proper subpoena for a given claim, here in, what, five thousand, five hundred of them, multiplied by however many trusts are involved, but they are asking the claimant the same thing.

The claimants don't have to waive whatever rights they have under the TDPs. The claimants can respond directly to that discovery, and that's the appropriate way for them to get at that information without gilding the lily and going into all kinds of redundant discovery in hopes that somehow they may be able to impeach somebody. If they get the identification of the claim and its status through the questionnaire or through the production by the claimant of trust claim forms, that should suffice for any reasonable need.

We object to the notion of a compelled waiver of

rights under the TDPs in response to a mere discovery request from Garlock.

Judge, I think I have said everything I meant to. We urge you to adhere to the existing rulings and for this process to go forward.

THE COURT: Mr. Worf.

MR. WORF: I will respond briefly, Your Honor.

The committee says that the revised form would require the claimants to undertake the burden of working up information about Garlock exposure that they did not be required to do in the tort system. The newest claim that is subject to this questionnaire is almost a year old. The petition date was June 5 of last year. This questionnaire will be issued, it appears, about the same time.

So if the claimant doesn't know how he or she was exposed to the Garlock product, now is the time to find out, and it is something that someone with a Garlock claim should know and if, as the committee says, the claims are worth what the committee thinks they are, which I believe they are going to say is seventy-five thousand dollars a claim or more, that is not an undue burden to require the claimant to answer some very simple questions.

Like I said, these questions are far simpler than what they would have to answer in the tort system where they would have to describe much more regarding the details of their

exposure.

The committee says that there is no evidence that Garlock took discovery like this in the tort system. Well, there is no evidence in the record that Garlock didn't and it is my understanding that Garlock did take discovery just like this about the mesothelioma claims in the tort system. I think the committee is rehearsing an argument they made in many previous cases that pertain to the hundreds of thousands of nonmalignant claims that honestly were not worked up by defendants because they weren't worth very much individually. These mesothelioma claims, that is just not my understanding.

These claims were serious claims in the tort system and discovery was taken in order to determine what the other exposures were and what the basic Garlock exposure was. It is certainly not something that Garlock wasn't doing. As the court is aware, they employed many lawyers to work on these cases and they were out there doing basic written discovery.

The cases certainly did not all go to trial but Garlock was not, by and large, settling these cases not knowing what they were about. As Mr. Simon testified, there were, according to him, good Garlock cases and bad Garlock cases. And these simple questions are designed to figure out which ones are which among the pending claims.

A point that I am sure we will air later today is whether the questions about the other exposures somehow shifts

the burden from Garlock to the claimants, and I think the committee is confusing a burden of proof, which is what Mr. Glaspy testified about, with a discovery obligation. Mr. Glaspy did testify that, when the bankruptcies happened, yes, it was now the burden of proof of the defendants to produce evidence sufficient to survive a motion for summary judgment with respect to the alternative exposures. Because now they were trying to lay off liability on others, the plaintiff was no longer trying to prove up liability against the bankrupt, but they shouldn't confuse a burden of proof with a discovery burden. Mr. Simon testified quite plainly that it's a discovery obligation for plaintiffs to tell defendants what they know about the other exposures. He said on page 133, he was asked:

> "Are there some cases where you might be aware of evidence of your client's exposure to products of bankrupt companies and your client might not be aware of those?
>
> A. Yes, sir.
>
> Q. Okay. And in those cases, is that evidence of exposure, is that discoverable readily by defendants through simple discovery?
>
> A. Yes."

It's a discovery obligation and it is not controversial. It is plainly discoverable. And, like I said,

we are not requiring them to work up the other exposures; we are just asking what they are. The work sites aren't sufficient because they don't answer that question of are the plaintiffs admitting the exposure to the products, and that is why the continued reference to some of the work that Bates White does for certain tort system clients where Bates White tries to estimate what the trust recoveries are, is a red herring. Bates White does that work, can give those defendants some idea of what the offsets are going to be, of what the trust claims are, and Bates White is not assessing the ability of those defendants to have the plaintiff admit the exposures at trial, which is the question we are talking about here and the question that Mr. Glaspy said was so significant.

Those reports and estimates are talking about the offsets; they are not talking about the exposures, and it is a distinct issue that bears on Garlock's legal liability for these cases.

Another Bates White point, we have heard several times today that Bates White, well, they didn't require this information to do their analyses for the financial reporting that the parent company did before the petition date. I mean, I think the court probably sees that that is just a fundamentally different task from what Dr. Bates is being asked to do in this court, which is opine on an estimate that is going to be a legal determination. Whatever form it takes, it

will be a legal determination, and the court through its order authorizing the questionnaire has seen that it is legitimate for debtors to take discovery when there is going to be something weighty like that happen.

Not to say that putting something in a financial disclosure is not weighty, but it is a fundamentally different activity. And, in fact, it is a good way to explain the difference between the estimation approach the debtors are pursuing and the court said the debtors could present evidence on and the one that the committee seems to be pursuing. The estimate that Dr. Bates was doing when Garlock was in the tort system was estimates of future expenditures, what is it going to take to resolve these cases, settle these cases. In other words, what the committee is talking about.

We have told the court that is not what this court should be doing here. Here, the court, when it is estimating claims, has to be estimating legal liability and it is a fundamentally different activity from what someone who is doing something for financial reporting would do. So that example is just inapposite.

We heard the argument again that these questions are not appropriate for an aggregate estimation. I think the committee would say that about every question in the form. I think they did say that about every question in the form. So I don't think that really speaks to these particular questions

and it is also debtor discovery. So the committee's statements about what the debtors and their experts do or don't need, I don't think should receive much weight from the court.

As a comparison to the previous questionnaires I believe shows, the debtors have been quite reasonable in what they have asked with respect to these topics and, for both of them, we are asking for less than previous debtors got where the issues to which those issues pertained were of less moment to those debtors, it mattered less because they had high-dose products and they also did not have the bankruptcy wave related issues that these debtors have and that will be aired at the estimation.

Just to clear up sort of a mechanical issue about the trust claim forms, in the last version of the questionnaire we did request that the claimants execute an authorization. One reason for that, as opposed to asking a claimant to attach the trust claim forms, was because in that version of the questionnaire we asked about claims that will be filed, and the debtors wanted the ability to go to trusts that haven't been established yet, such as some of the pending bankruptcy cases, and if those were established, have that authorization to be able to go and figure out what the trust claims that the claimants filed in between the time they answered the questionnaire and the time when a hypothetical estimation trial occurs.

The court cut out the claims that will be filed question. So we think it now makes sense just for the claimant to attach the trust claim forms to the questionnaire and we still have the option in there, if they would prefer, to execute the authorization. We are happy to take that authorization to the trusts and relieve the claimants of that burden of attaching claim forms.

Trusts respond to those authorizations all the time. They are not controversial. They don't waive any privacy rights. In fact, many state courts, as we showed the court at the last hearing, as a matter of their master discovery required the plaintiff to execute an authorization like that and then defendants can take it to the trusts and get the claim forms. It is utterly uncontroversial.

Again, we have taken out that option from this one and, as part of our modified proposal for the other exposures, have asked that they be required to attach the trust claim forms that they have submitted as of the time of the questionnaire, and we will leave it at that. That’s appropriate.

As we went into the last time and as we will discuss further today, the trust claim forms are held to be discoverable by every court, and I don’t think the committee has disputed that and they are legitimate discovery. As the California court said, a trust claim form isn’t a settlement

discussion; it's in the nature of a complaint and it contains, as many courts have held, including explicitly Judge Davidson in the Texas MDL, Judge Friedman in the New York City asbestos MDL and many other important jurisdictions, they all hold that the trust claim forms contain admissions of other exposures that are relevant to things that defendants like Garlock are concerned about. So they are discoverable.

With respect to the "have you admitted" question, I actually didn't have that even in the version I sent to the committee yesterday. That's something that we drafted in preparation for this hearing but I am, of course, open to wording changes. One potential change would be just to say were you exposed to a product for which this defendant is responsible and then the claimant would check yes or no depending on whether they had admitted that or not. That would take away any ambiguity.

And then the documents that we have requested that they be attached would provide any additional detail with respect to what the plaintiffs have – what the claimants have admitted with respect to the other exposures.

Finally – well, the committee makes another point about how it should be the debtors' burden to extract this information from the attached documents. The attachment option is preserved. They can attach documents to answer any of these questions, including the new Garlock questions, the questions

about Garlock exposure. So that, I think, is a non-issue. That document attachment option is still preserved. And that's fine with us. We just had to make clear in the questionnaire what the questions are so that the claimants know what documents to attach and what they have to make sure is responsive and true and complete when they respond to the questionnaire. So the questions are still important but they still have the option to answer with documents.

Unless the court has any other concerns, which I will be happy to address, we would respectfully ask that the court approve these modifications.

THE COURT: Well, on 5(a) and (b), I think we ought to stick with what I had suggested in the e-mail. I think I lost sight for a minute of the fact that we are dealing with estimation here and not with discovery in an individual lawsuit. And it appears to me, from all that Mr. Glaspy and others have said, that 5(a) and (b) is, I guess, as are contained in what Mr. Swett handed me, get the information that was - get that information or maybe more than what was regularly used in the normal course of making a determination of potential risk and exposure prior to bankruptcy. So that, and especially with the other tables that are attached, I think as to the other exposure evidence, gives ample information from which to make an estimation. So we will go with that.

And then, as I understand, it sound to me like there

was not a dispute about the claim form or about the authorization, that I understand Garlock is not proposing to include the authorization at this point?

MR. WORF: Well, we asked that they attach their trust claim forms.

THE COURT: Or sign this.

MR. WORF: Or sign that, that's right, Your Honor.

MR. SWETT: That represents a shift because in the previous edition the claimant had the option of completing the boxes and other information required by the body of the form or supplying documents and now, while conceding that the authorization to go to trusts to get trust claim forms ought to be an option, and I have no objection to that, I don't think that should morph into an affirmative obligation on the plaintiff's part to produce the trust claim form if they prefer to execute the narrative parts of the questionnaire which is where matters stood when we last presented this.

THE COURT: I think we ought to include the claim forms as to claims that have existed. So if that's a morphing, let's morph that way. That seems to me easy enough to do.

MR. SWETT: But with the authorization to go to trust being the option to direct production?

THE COURT: Yes.

MR. SWETT: Yes, sir.

THE COURT: Okay. With that being said, do you all

think you have what you need to try to come to some final document?

MR. SWETT: Yes, sir.

MR. WORF: Yes, Your Honor, I think we do. I don't know if Your Honor wants to wait until the next hearing for us to bring it or we would be happy – I think we would be able to submit it –

THE COURT: I think as soon as you all get it agreed on, we can enter an order that it be sent out.

MR. SWETT: We submitted a proposed order that included confidentiality and use restrictions that you accepted. So what I suggest is that we sit down together, go over the state of the rulings and pick and choose from the different forms to conform to the rulings, present a conformed copy with the order for Your Honor's consideration.

THE COURT: Okay. The next question is whether you all want to do that now with the time we have left today or whether you want to go on to other things today and come back to that?

MR. SWETT: My preference would be to argue the other motion and get it over with and to then have a day or two to work with Mr. Worf to conform the questionnaire. I will be available Monday.

THE COURT: Okay. Is that all right with you all?

MR. WORF: I think that makes perfect sense. We can take today –

THE COURT: Okay. All right. Well, then, let's take a break for about – come back about five minutes of three and we will go forward.

(Recess from 2:42 p.m. until 2:57 p.m.)

MR. WORF: Your Honor, I think the next thing on the agenda is the debtors' – the amended motion of debtors for order pursuant to Bankruptcy Rule 2004 directing production of documents from specified past asbestos claimants and their law firms, and I am going to speak to this, as well.

We have some themes that are similar to what I already discussed today, so hopefully that will expedite the presentation.

This motion is a motion to obtain four categories of non-privileged documents that are in the custody of law firms that we believe represent persons who either settled with Garlock in the past or obtained a verdict against Garlock. These persons are listed on the exhibit to our motion and they are approximately five hundred in number from thirty-three law firms.

I am going to proceed in three parts. First of all, explaining the relevance of the documents to aggregate estimation and then addressing whether the documents are not discoverable because they are privileged or for some other reason, and then finally I will address whether the documents are available from some other source.

The basic reason for the debtors seeking discovery of these documents from past claimants is that the committee has put settlements with past claimants at issue with the estimation methodology they have forecasted they will present at the aggregate estimation trial.

You have heard from Dr. Peterson at the case administration hearings, and you saw examples of reports that Dr. Peterson has submitted in previous asbestos bankruptcy cases. Dr. Peterson uses the average settlement value for cases from some period before the petition date to inform his projection of what debtors would have paid to settle cases had they remained in the tort system.

Then he often actually inflates that number or at least he did in the past decade, but the past settlement history was the starting point, and then he often justified his upward adjustments by reference to settlement histories of other defendants who had remained in the tort system and had later declared bankruptcy.

But that is a starting point, is the past settlements, and you saw in the preliminary estimation that Dr. Peterson had prepared that he used a figure of seventy-five thousand as the average settlement value for current and future mesothelioma claims against the debtors. And the reason he did that was that was the average settlement value in a case in one of the years before the petition. I think it was lower than that

directly before the petition, but that was the average value, I believe, a couple of years before the petition.

So the committee has shown that what they are going to do is use the past settlements in order to value debtors' liability for current and future asbestos claims. And it is our contention that the debtors are entitled to simple discovery that is directed at rebutting the notion that past settlement values are an accurate proxy either for debtors' legal liability or current and future asbestos claims, what we say is important, or for what the committee says is important, which is the future cost of settling the current and future asbestos claims.

And let me explain why. First of all, we cited in our brief, and this is my slide two. I put a presentation up there for Your Honor. It is thankfully shorter than the last one, and I have also got a binder of exhibits, all of which we have introduced before and that I will refer to, which I have also provided to Your Honor.

As we cited in our reply brief, Professor Gibson at Chapel Hill who wrote this "Judicial Management of Mass Tort Bankruptcy Cases" for the Federal Judicial Center says:

> "Frankly a debtor should have the opportunity prior to a judicial estimation to establish the invalidity of past settlement values as a basis for valuing present and future claims."

And that is what the debtors are trying to do through this motion, is to test their central contention regarding why the 2000 to 2010 settlement values do not accurately reflect debtors' liability for current and future asbestos claims.

Now, the committee says that those settlements are the right yardstick for the current and future claims and, as the court knows, debtors object to the use of settlements of any kind for the purpose of fixing their liability for asbestos claims, but the committee has said that's what they are going to do and, as we discussed this morning, there is no ruling yet on whether they will be permitted to do so.

So in the interim, it is legitimate discovery to take discovery relevant to any party's claim or contention. That's just the standard Rule 26, incorporated in the Bankruptcy Rules. And so we are taking discovery that Professor Gibson endorses relevant to the past settlement values.

Now, why are these particular documents relevant? Well, they are directed to one of the central issues in the case, which is why Garlock's settlement values increased abruptly and suddenly after 2000. The debtors' contention, which Your Honor heard from – didn't hear the contention but heard the evidence from Mr. Glaspy that supports debtors' contention, which is that was a product of two factors. First of all, the exit of the bankrupts meant that the primary source of compensation for mesothelioma claimants, including the ones

who asserted claims against Garlock, disappeared and Garlock, along with the other remaining defendants, were exposed to the risk, if they were held liable, of bearing portions of liability that the bankrupts had previously born, and that was a material effect on Garlock's settlement values.

The second reason for the increase, Mr. Glaspy also testified about, was the disappearance of plaintiffs' identification of the bankrupt exposures, their identification of the insulation products and other dusty, high-exposure products, that they had previously identified freely and now, according to Mr. Glaspy, were no longer identifying.

Now, as far as why that happened, why the identification ceased, for purposes of this motion, that's not really important. The debtors have said things about that and the committee has said things about that. The committee says the plaintiffs no longer had an incentive to investigate those exposures. The debtors think that probably had something to do with it but also, based on some evidence we have seen, suspect that some evidence may have been obscured or concealed. But who is right on that doesn't really matter for purposes of this motion.

In this motion, we are simply attempting to determine whether, for what are many of the most significant cases that Garlock settled over the past decade, Mr. Glaspy is correct. Mr. Glaspy testified he has his experience, but we need to do

it somewhat systematically and figure out whether, in the most significant cases, many of the most significant cases that Garlock had, he's correct, that the identification of the exposures was postponed until after the tort system case had resolved and whether the trust claims that those claimants had available to them eventually were pursued after Garlock had settled their cases.

If we can show that, debtors will have shown that the past claims are significantly different from what the court can expect the current and future claims to be because now the trusts are operating. They are paying current claims. Plaintiffs are coming up with evidence to sustain claims against those trusts, and the questionnaire is going to help us show that, but this motion is important, too, in addition to the questionnaire, because it will let us show that the past claims are different from those current claims that are subject to the questionnaire, and that is something that the court is going to want to know when it is valuing the current and future claims.

I won't go through all of Mr. Glaspy's testimony again concerning what happened in terms of the case against Garlock over the past decade. I went over that in the previous argument and the gist of it was that the insulation exposures, the identification of those exposures, as well as other friable asbestos products, decreased dramatically. The defendants

couldn't make up the gap because, without the plaintiff's help, it is extremely difficult, if not impossible, to tie a product to the plaintiff's breathing zone, which is what is important for establishing that that product and not Garlock's product caused the mesothelioma.

So it wasn't enough for Mr. Glaspy to have the work site or some basic knowledge about the occupation and industry of the claimant.

Now, Mr. Simon testified to the contrary. He said, no, co-defendants or defendants were able to identify those exposures and prove them at trial just on the basis of cross-examining a witness and doing things like that. So according to Mr. Simon, he disagreed with Mr. Glaspy about the ability to still demonstrate those exposures. That's a conflict in the evidence. Something to be resolved at the aggregate estimation trial.

In the meantime, though, the court has Mr. Glaspy's testimony and that should determine the scope of discovery. His testimony was that the decrease in the plaintiff's rate of identification was significant and was an important factor. This discovery will help show that it actually happened. It's important to know whether Mr. Glaspy was correct on that.

Now, the committee disputes that that was the reason or that those were the reasons behind the increase in Garlock's settlement values over the past decade and, by those, I mean

the two reasons the debtors rely on, which was the disappearance of the evidence and the unavailability of the offsets and credits.

We have heard various things from the committee. We haven't heard anything systematic yet. There are no expert reports yet, but we have heard, first of all, that the increase can be explained by the increase in the value of mesothelioma claims. Mr. Glaspy disputed that at pages 48 to 49 of his testimony where he testified it wasn't about the change in the total value of claims, which has remained fairly constant across his career, but it was rather the lack of evidence and the lack of offsets.

So the committee disputes that the factors the debtors rely on are the explanation and the debtors need the ability to demonstrate that, no, that was going on and it's a reasonable explanation for what was occurring. And as I said, Mr. Simon even disputes that that's what was going on. He doesn't think that the evidence disappeared, and this discovery is aimed at showing that it did.

The committee also says that the trusts are not going to have an impact on Garlock's settlement values because certain trusts began paying claims in 2007 or thereabouts and allegedly Garlock's settlement values didn't decrease when that happened.

Now, in the portion of Dr. Peterson's testimony that

we cited in our brief, Dr. Peterson testified that, after he had testified to that fact, testified that it's important to know whether the claimants that Garlock was settling with between 2007 and 2010 were the ones who were making and receiving payments on the trust claims because otherwise you wouldn't necessarily expect an impact.

And Dr. Bates testified about how there is good reason to believe that wasn't occurring during 2007 and 2010. It had taken seven years for some of those debtors to reorganize and they had built up large backlogs, both prepetition and post-petition, pre-effective date claims, that those trusts had a process in many cases first, and Dr. Bates testified that that's a reasonable explanation for what was going on and that the claims were not the same between Garlock and the trusts.

This discovery will also address that issue by showing whether the Garlock claimants between 2007 and 2010 that Garlock was settling claims with were the ones who were making claims against the trusts and resolving their claims with the trusts with the resulting impact on the settlement value of the Garlock claim.

So the discovery that the debtors are seeking is directly targeted at demonstrating the discontinuity between the tort and the trust systems, and here's what they are. It is ballots that the thirty-three firms cast in previous bankruptcy cases on behalf of claimants; other discovery that

the named claimants submitted in previous bankruptcy cases; trust claim forms that those claimants, the past claimants submitted to trusts; and finally documents sufficient to show the status of those trust claims. In other words, whether they have been paid or not, although not the amount of the payment.

All of those documents provide evidence of identified exposures to products for which bankrupts were responsible, and I will refer to exhibits that we previously introduced to demonstrate this fact and move for their admission with respect to this motion.

First of all, GST 112 is one of the master ballots for accepting or rejecting the Pittsburgh Corning's third amended plan of reorganization, and it shows there, in submitting those ballots, the law firm certified under penalty of perjury the identified claimants' exposure to Pittsburgh Corning asbestos. So that's an admission in a court relevant to exposure.

Then we also have the personal injury questionnaire in the *W.R. Grace* case, which is an example of the other discovery that would be covered by this order and by this discovery and there, as we showed the court earlier, the *W.R. Grace* questionnaire asked about exposure to W.R. Grace asbestos, as well as other products. So that's also directly relevant, to the extent the claimants answered it, to when they identified the exposures to those companies. Those questionnaires, I believe, were submitted between 2005 and 2007. So many of

those claimants had resolved Garlock cases much earlier and that would show what they learned in the interim between settling the Garlock case and submitting that questionnaire in the *W.R. Grace* case.

We, of course, are not asking for all of the questionnaires in the *W.R. Grace* case, just the ones that the five hundred claimants may or may not have submitted.

Next, the trust claim forms, and we have introduced examples of those at the last hearing, at GST 137 to GST 144, and I should note that I have provided Mr. Swett with a list of the portions of those that were treated as confidential. So those exhibits are with us, as well as in these binders, but we now know what parts we are treating confidential, and I would propose to treat them the same way here.

And those show, as well, that trust claim forms contain admissions of exposure to products for which those trusts, and previously those bankrupts, were responsible.

I am taking a look at GST 138 just as an example, and it lists here a claimant's exposure to products for which Celotex was responsible, and it has a fair amount of detail about that. It says even the names of the products to which the injured party was exposed. Celotex, of course, was not one of the bankrupts in the bankruptcy wave but we just offer that as an example of what is contained in the trust claim forms that's relevant to the issues that we are discussing.

And then finally documents sufficient to show the status of the trust claim. Very simply whether a claim has been resolved or not, and that would tell debtors when the claim was resolved and, thus, whether it was resolved in a time period different from when Garlock was resolving the case during the past decade.

We have stayed away from settlement payments. We are not asking for those and just limiting this to the categories that I discussed.

We think that this discovery is very focused. It is trained on exactly the issue that is really the major one in this case of explaining what happened over the past decade or what meaning that has for Garlock's current and future liabilities, and it's really a limited and discrete set of documents that's implicated by it.

What we did in constructing the sample was to take no more than thirty past claimants from any one law firm to minimize any burden on the law firm. In general, as the committee pointed out in its brief, these were the higher value claims that debtors resolved at that law firm, and that's for two reasons. First of all, those higher value settlements are the ones that are likely to be pushing the average up over the past decade. So if you know something about those, you know a lot about how characteristic that average is for the current and future claimants. And then, second, these are all claims

that, because they were relatively high-value settlements, were the subject of discovery and a discovery that will show what the products identified when Garlock was resolving the case were, they can be compared against what later happened to show whether debtors' explanation for what was going on is correct.

For some law firms, it is far less than thirty. I think for some it's just a handful of claims, so that the total is about five hundred.

So that's what we are seeking. That's why it's relevant and that's how the sample was crafted. The next question when deciding whether discovery is legitimate is whether it's privileged or otherwise not subject to discovery, and I think most of these documents are self-evident that they are not privileged. The ballots and the discovery in previous bankruptcy cases are either public documents in the case of the ballots or, in the case of the discovery, were submitted to an adversary of the claimant, so they are not privileged.

And we have put on a lot of evidence also about how the trust claims are not privileged, and I have repeated that evidence in the exhibit list here. I will just briefly, for the sake of the record, go through all of that. It is GST 146, which is the standard interrogatories in the New York City asbestos MDL; GST 148, which is a particular order holding that trust claims are discoverable in the New York City asbestos MDL; GST 149, the case management order in the Texas MDL; GST

150, which is a ruling from the Texas MDL on the discoverability of trust claims; GST 151, which is the similar language from the Cleveland asbestos docket; and GST 152, which is the one from Los Angeles; GST 146, which is the one from Philadelphia; and then GST 51, which is the West Virginia case management order.

So those are most of the important asbestos jurisdictions in the country and it shows that they are discoverable.

Now, the committee in their response makes the argument that, well, yes, they are discoverable when you have a current claim but Garlock settled all of these claims, so it can't rely on these case management orders or anything else to say that it's entitled to discovery here. But I think the committee misses the point of those case management orders. It's not that these claims are still open. Obviously they are not. They are either verdicts against Garlock or settlements. What the case management order shows is that, when the trust claims are relevant to pending litigation, such as the aggregate estimation trial, they are discoverable and they are not privileged. Privileges don't spring up just for particular kinds of litigation. Something is either privileged or it's not. The fact that these are discoverable in some cases, namely asbestos products liability cases, means that they are discoverable whenever they are relevant in litigation, as for

the reasons I have discussed, they are relevant here to the aggregate estimation.

And it is especially ironic because it's the committee that has made these past cases relevant by deciding to base their estimation methodology and their estimation standard on the past settlements and using them as the yardstick for Garlock's current and future liability.

If the committee would stipulate that that was not their intention, I think we could very well most likely withdraw this motion, but they haven't stipulated that and they obviously won't, and that's why the documents we seek are relevant and are legitimate to test the committee's contentions. And, in fact, as we set out in our reply brief, the committee has conducted its own discovery with respect to these very claimants in the form of documents that are in the possession of Garlock. Just to mention a few, the settlement terms and payments, as well as the other information in the database with respect to these claimants. The verdicts that certain of these claimants, these past claimants obtained against Garlock, certain trust claim forms that Garlock has obtained from certain of these past claimants were covered by the committee's discovery requests and will be produced to the committee. And the ballots that were cast in the *Pittsburgh Corning* case, which debtors obtained in early 2010 and that the committee requested and either has or will soon receive, those

ballots contain the names of many of these claimants.

So it's especially odd that the committee says these claimants are out of bounds because they put them at issue and they have also done discovery with respect to the claims.

Now, the debtors are seeking discovery from another source. The committee has no documents relevant to these claimants. The committee didn't exist before June 2010. So we can't get them from the committee the way the committee can get them from us. So we have to get them from the law firms or somewhere else, as I will discuss later on. That's where you get the documents, and the debtors are entitled to get these documents that are relevant to meeting the committee on fair ground at the aggregate estimation trial.

I want to say a little something about the source. We have directed this to the law firms and also to the claimants. Insofar as the court decides we can't obtain them from the law firms except as agents for the claimants, for the past claimants, another source for much of the same information, namely the trust claims and their statuses, are the trusts, and the debtors filed their trust motion on October 13, 2010. That motion hasn't been heard yet. It has been put off for various reasons. But it's important to note that the trust, when they responded to that motion, said you shouldn't be getting it from us, we are strangers to this litigation. You need to go to the law firms who are the ones that handled the case against

Garlock and obtain it from the law firms. And we cited all of those responses from the trusts in our reply brief.

So here we are, we have made the motion to get it from the law firms, and it's frankly a more constricted set of documents because we know a little something about the trusts and their information and document processing capabilities and the fact that it should be easy for them to produce this data for essentially all of the past claims against Garlock.

The law firms were not quite so sure, so we wanted to make sure that we limited it to a manageable number, and that's why we limited it to thirty-four law firms, and we think that would be sufficient.

But that's what we have done. We have gone to the law firms and are trying to get it from there. And what does the committee say about that? They say, well, no, you can't get it from the law firms either for various reasons, but you can't get it from the trusts; you can't get it from the law firms. I imagine they don't - well, actually they also say that we can't get it from the claimants, the past claimants.

So that just can't be true that there are documents relevant to litigation that are not privileged and that are in some no man's land where they can't be gotten. That can't be true.

We cited in our reply brief the famous line from - well, it's been quoted in many cases but I think most recently

in the *Jaffe* case that the public is entitled to every man's evidence, and that's a fundamental principle of litigation and discovery, that relevant and non-privileged documents are discoverable and should be discovered, and litigation should be a search for truth, and that was said in the context of rejecting a privilege, a certain kind of privilege.

Here, we don't even deal with an issue of privilege. The documents are admittedly not privileged but yet the committee wants to say that you can't get them from anywhere and that's just not fair because the committee is wanting to rely on those settlements to fix the debtors' liability for the current and future claims, and it just doesn't make sense.

The debtors, like I said, have put off the trust motion and are still, of course, willing to get this information from the trusts if the court thinks that would be more efficient and economical. It very well might be, and we intend to have that motion on for hearing as soon as it is feasible, but we think that this motion is also feasible and would be a most efficient way to get the documents. It covers less claims but we can live with that and obtain it from these law firms.

Now, one reason why the committee says that you can't get this from the law firm is that you can't subpoena a law firm. It's improper and you can't get documents from them, and it's just not done, it's not possible. Well, we cited, I don't

know, more than a half a dozen of cases. I think certainly more in our reply brief showing that's just not true. Litigants obtain relevant and non-privileged documents from law firms all the time. I certainly know that in my firm's practice we respond to subpoenas for relevant and non-privileged documents. I think that's the practice in many law firms and it's no different for these law firms, and I think the *Ratliff v. Davis, Polk & Wardwell* case is quite instructive. In that case, there was not even jurisdiction in the United States over the law firm's client. It was a Dutch client that was abroad and was not amenable to process in the United States, couldn't even be compelled to come and show up in a U.S. court. Its law firm was in New York City and documents relevant to litigation in Georgia were subpoenaed from the law firm, and the law firm comes to the Second Circuit and says, well, you know, we got these documents from our client and you can't get them because that inherently makes them privileged, the fact that the documents came from the client to us, and we are asserting that privilege and we are here and the documents shouldn't be produced.

The Second Circuit said, no, that's not true, documents that are privileged – not privileged and relevant are subject to subpoena when they are in the hands of a law firm subject to process in a United States court, and these documents were not privileged because they had all been shared

with the litigation adversary of the Dutch company, which was the SEC.

So the Second Circuit had no trouble concluding, a panel upon which now Justice Sotomayor served, had no trouble concluding that Davis Polk had to turn over those documents, and so they did.

Obviously the client – the law firm doesn't have to be served or do anything. The law firm might have an obligation to the client, very likely does. I mean, you have a professional obligation if you are a law firm and, even if you have no association with the client anymore, to protect privileged documents that are in your possession and any lawyer would do so. So the law firm would have a professional obligation to oppose production of privileged documents, but it is no defense to having to produce non-privileged documents to say I am a law firm, I am in no man's land. That's just not true.

We have a lot of other cases. We have a couple of criminal cases are cited, you know, subpoenaing law firms for records. That is something the federal prosecutors have to do all the time. It's not – I guess, more precisely, Grand Juries do all the time. It's not something unusual.

We even cited a case, the *SEC v. Lewis* case from, I believe it's the Eleventh Circuit, where the law firm – the documents, the purpose of the documents was to identify the

client, and that's why they were relevant to litigation between the SEC and Lewis. And the client – I mean, the purpose of the documents was to identify the client and the client wasn't known to the person subpoenaing the documents. They obviously couldn't be notified or brought into court to be heard.

In fact, there's authority to support the notion that, when non-privileged documents are subpoenaed from a law firm, the client doesn't even have standing to object to the subpoena, that it has to be the law firm that objects. Of course, the law firm would if the documents are privileged but, if the documents are not privileged and the law firm for some reason didn't object, then there are cases that state the principle that a client doesn't have standing to object to the subpoena unless the documents are privileged.

So there is that, but we don't have to go that far here. If any claimants wanted to show up and object to the subpoena, they certainly can do so, but the point is that we don't have an obligation to serve the client and figure out where they are and have the client and the law firms use our inability to find out where the client is as a defense to not producing not privileged and relevant documents.

But if we have to serve the client, we have asked for the law firm to provide the address and we are happy to serve the client, as well. The committee says, well, maybe the law firms don't know the address of the clients. Well, we don't

have the law firms here to say that. It's unclear to us how the committee would know that before the law firms have been asked to provide the information but, in any event, the law firm could provide that address and say whether or not they have a reason to believe that that is the current address. Again, like we said, we don't think that's necessary but we have included that as part of the relief we request in case the court is inclined to make us do that.

There is also this specter which comes up from time to time of difficulties enforcing the discovery and collateral litigation. We think that there are easy ways for the court to manage this that would prevent collateral litigation. Like we said, we think Rule 2004 is applicable. The court in Garlock could easily notice a hearing where the law firms, the thirty-three law firms, would be instructed to come and object, if they have objections, to the production of the documents that the debtor requests. That decision would bind those law firms and then, when Garlock issued the subpoenas, that would collaterally estop them from starting litigation in all the different forums where the subpoenas would issue, which is something that you obviously want to avoid.

That would be a perfectly fair way to do it. That's the way that Judge Gerber was going to handle the trust discovery and he said in his order about that, that it would be inappropriate for the trusts in that case – here, the law firms

– have a second bite at the apple after being served with and had the opportunity to object to the Rule 2004 request. So that's an easy way to do it. Rule 2004 is available for the reasons that we have discussed. It's an appropriate tool to be used even in anticipation of litigation when there is not yet a pending contested matter because there is no pleading here that asks for aggregate estimation yet. There is not a pending contested matter, and that is an easy and judicially administrable way to do it.

The committee says that it is unprecedented to take discovery like this. Well, no, it's not. It's not unprecedented to take third-party discovery relevant to pending litigation. It happens everyday in every federal court in the country and, you know, I am not as familiar, although I am increasingly so with the previous asbestos bankruptcy cases, I have a feeling it has probably been done there before. I can't substantiate that but, even if it hasn't and the committee can prove that, it doesn't tell us anything. It's relevant here. The issues here are different than were involved in the previous cases, and I think we have demonstrated the clear relevance of these documents.

And, again, Professor Gibson supports this sort of effort and giving debtors the opportunity, before their liability is fixed, using past settlements to demonstrate that they inflated the liability.

Now, the committee claims that the discovery is not within the spirit of the court's December 9th order. We think it is. It's directed to aggregate estimation. We think that it incorporates many of the rulings that the court has made along the way about efforts to find a sample, and we have taken great care to construct a sample here that will not impose a burden on law firms and will be easily administered.

Finally, the committee argues that taking this discovery will violate the debtors' settlement agreements with the settled past claimants. I think we have dealt with this well in our brief but I will just reiterate the point. That's just not true. Settlement agreements are not a bar to taking third-party discovery from parties you have settled with even when you gave a general release to that party. We cited numerous cases holding that where the party seeking to obtain documents through subpoena had settled with the target of the subpoena and had executed a general release and the subpoenaed party argued, well, you executed a general release, you gave up all your rights against us, and those courts said, no, we are not construing even a general release to eliminate those rights, those subpoena rights in subsequent litigation.

Obviously someone who has executed a release like that cannot resume litigation against that party covered by the release unless there is good reason to obtain the release from it but, even in the case of those releases, there's no bar to

third-party discovery.

As we represented in our brief, to our knowledge Garlock didn't execute any kind of release for these settlement claimants. The standard agreement was that the plaintiff who had sued Garlock executed the release and Garlock promised to pay money and did pay money, and there was no release going the other way.

So if you can execute a general release and not lose your third-party discovery rights against the released party, Garlock, who didn't execute any release at all, didn't lose those rights and it's frankly a frivolous argument to say that Garlock is in a worse position than parties in these cases who executed a general release.

There is no prospect of that or of administrative claims in contract or tort that are going to arise as a result of this discovery.

So just to sum up, this evidence is in the core of relevance and the debtors' rebuttal of the committee's projected estimation case. The documents sought are not privileged. The motion has been carefully drafted to impose little burden on the law firms and to obtain the evidence that is most relevant to debtors' rebuttal. The motion could be administered through devices that this court has in its disposal and the motion is otherwise proper.

So for all of these reasons, the debtors request that

the motion be granted. Thank you.

THE COURT: Mr. Swett.

MR. SWETT: May it please the court, we just heard that discovery of people who were but are no longer claimants against Garlock would be relevant somehow to show what Garlock should pay to future claimants and others. How remains a mystery. We contest the fundamental issue of relevancy with respect to this information, and I will get to that in more depth.

We have heard that these documents are not privileged. That is true. We are not asserting that they are privileged. What we are asserting is that, as a matter of the court's discretion to shape the estimation process and as a matter of its discretion under Rule 26, which notwithstanding Garlock's protestations to the contrary, is the governing regime here, not Rule 2004, you ought not to let them go there because the benefits of doing so will be far outweighed by the detriments to the process that will result predictively and inevitably from that misguided effort.

We have heard that the requests are crafted to be minimally burdensome but, by virtue of going back to an extinguished claim in the hands of a lawyer who used to represent the client, who was a claimant against Garlock but is no longer, no burden is justified. There is nothing that has been said in the affirmative effort to support this discovery

that gives any good cause, much less a compelling reason, for this unusual, indeed extraordinary step. To our knowledge, it has never been done in any of the asbestos bankruptcy reorganizations where the standard methodology has been used. Not even in those few abortive attempts to conduct estimations, something similar to what the debtor has in mind here. It simply hasn't been done because no one ever thought it was appropriate or useful to go disturb past claimants in search of some evidence whether or not it was directly potent, whether or not it had significant implications for the estimation or the forecast, whether or not it would burden the estimation process in a particular case in a uniquely contentious and disputatious way, all of which is true here.

Now, let me begin with the legal framework. We are offered the siren song of a Rule 2004 hearing in the Western District of North Carolina to call in lawyers from all around the United States, who are outside of the territorial jurisdiction of the court, to make a once and for all ruling on the appropriateness of this discovery request against other people, third-party former claimants who wouldn't be in the courtroom, and that that would somehow bind the world once and for all without the unfortunately messy process of going through Rule 45 subpoenas in the courts where the subpoena targets are found and having enforcement proceedings commenced in those courts and carrying on in the normal way under the

federal rules.

Rule 45, I should point out, doesn't depend on whether the discovery request purports to be brought under Rule 2004 or, instead, under Rule 26. A Rule 2004 subpoena has to be served out under Rule 45. The same protections apply under Rule 45 whether or not the paper says Rule 2004 in the heading instead of Rule 26. That is a (inaudible). It will solve none of the procedural problems that will predictively result from this misguided discovery.

But Rule 26 is in fact the governing regime. We know this because we are in a contested proceeding, as the debtor has admitted previously when it suited its purposes to do so. For example, at the March 3rd hearing transcript, page 173, lines 25, to 174, line two, this is Mr. Cassada speaking:

> "We are in an estimation but we are in a contested estimation, and we are seeking discovery in a contested estimation."

In the Rule 2004 motion seeking production of data from trusts filed on October 13, at page five, paragraph fifteen, this is docket number 601, if I am reading this note correctly, quote:

> "Both the debtors and the committee have moved for the initiation of a contested matter in the form of the estimation of asbestos claims."

And the amended motion for discovery from past claimants itself

refers to Rules 9014 and 9016 of the Bankruptcy Rules which incorporate Rule 26 and Rule 45; in the case of Rule 26, subject to the court's discretion to rule otherwise. There has been no such ruling here.

But one thing is clear from the case law, and has never been controverted by the debtors, when you are in a contested proceeding, discovery proceeds under the Federal Rules of Civil Procedure, not Rule 2004, and the case law is equally clear that Rule 26 and Rule 2004 do not operate simultaneously. It's one regime or the other and the onset of a contested proceeding such as we have here ousts Rule 2004, brings in Rule 26, as frankly the argumentation of the debtors in their recent briefing on the questionnaire itself implicitly acknowledges, they have been making their arguments under Rule 26.

Rule 2004 is not a *deus ex machina* to solve the problem of proliferating satellite litigation that this motion seems calculated to produce.

Now, Rule 26(c) – I don't think that's the right cite. (Pause) Rule 26(b)(2)(C), on motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines, and then there are several alternatives. One is that the discovery sought is unreasonably cumulative or duplicative, could be obtained more readily from another source. Another is that the

party seeking discovery has already had ample opportunity to obtain the information by discovery in the action. The third, which is the one I have focused on for the most part, the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues.

As a matter of law, when the debtors say evidence conceivably relevant and not privileged, case closed, the discovery must go forward, is not correct because the court has to exercise the discretion inherent in 26(b)(2)(C), giving attention to such factors as I just described and others of similar character.

Here, that discretion is reinforced by the nature of the proceeding itself. This is an aggregate estimation. The case law on estimation, which the debtors themselves have cited in attempting to justify their novel approach, emphasizes that the judge has substantial discretion to craft the proceeding to serve the intended purpose. And here that discretion dovetails with the discretion, indeed the duty under Rule 26(b)(2)(C) to keep the discovery focused on what really matters or that can be obtained without undue disruption of the proceeding so that the matter can go forward and serve the purposes of aggregate estimation, which are not mathematical precision but efficiency

and, in effect, rough justice, so that we can have a plan while we are still all middle-aged.

Now, when we consider these factors, it seems to me they point clearly to the answer that this discovery is ill-considered and should not be allowed.

Needs of the case. This case, as I have mentioned, is the estimation proceeding. If the court allows the discovery to become inordinately focused on individual claims, past or present, it will destroy the utility of the procedure in the manner that I just described, the intended goals of efficiency, the focus on the aggregate, the need to get through the process expeditiously. All of those benefits will go by the wayside if we focus inordinately on individual claims. In this respect, Your Honor's rulings on the questionnaire implicitly apply the discretion that you were compelled to apply under Rule 26(d)(2)(C) and that decision provides a useful model here. The same factors that caused you to say that certain queries provided enough information for estimation purposes and others would be excessive in that context, that same kind of judgment call needs to be made here.

So that's the needs of the case. You can require the defendants to make out their theory that, if settlements in the past decade were somehow inflated in a way that ought to be adjusted before you forecast and estimate the future or determine, as they would have it, the legal liability, we are

not saying they can't make those arguments by appropriate means of proof. We are saying that to go to people who are not Garlock claimants any longer, who specifically either bought peace or won verdicts against Garlock, would be an abuse of discretion and the wrong thing to do.

The parties' resources is another factor under Rule 26(b)(2)(C). These are bankrupts. They are not entitled to the sort of no-holds barred, lavish discovery menu, that a civil litigant using only what were incontestably its own resources might be entitled to do. You don't have the same degree of deference towards a debtor in this kind of discovery process that you would have outside of bankruptcy to an independently funded, solvent litigant who chose to devote a certain level of resources to the case.

The debtors are not entitled, simply put, to consume inordinate resources re-fighting the tort wars that brought them into the bankruptcy court for shelter in the first place.

The importance of the issue. They pitch this discovery now purely as rebuttal to Dr. Peterson's use of the settlement database pursuant to the standard methodology. Their main point there has been so far it's not admissible under Rule 408. That's wrong. We will have to find an opportunity going forward to tee up that issue and get it ruled upon expeditiously so that we can know where we are.

But the issue of whether or not a given number that

emerges from the data is the right number to attribute to an average mesothelioma claim going forward is one that can be attacked in a number of different ways and doesn't reasonably require you to go disturb settled cases or cases that have been resolved by judgment.

So the issue, although not unimportant, is amenable of being tested by other fair means that don't require this extraordinary step. There is a logical disconnect in this idea which is at the heart of the motion although somewhat obscured. We are going to go to past claimants to get their documents bearing on claims against insolvent defendants in order to show what the circumstances Garlock would face in settling claims with other mesothelioma victims in the future would be, and one doesn't respond to the other. It is sort of piling an inference upon a speculation. There are much more direct ways to skin the cat, if there is a cat there to be skinned. They haven't adequately explained why going back to past claimants in derogation of finality, which is what was achieved by those settlements or by those judgments, can possibly be worth the candle in terms of its probative force. And they are not entitled, I think, to experiment with that kind of thing. They are asking for discovery from five hundred people, not a trivial matter at all.

The discovery will be cumulative of discovery that they took in the tort system. Here it is indeed relevant that,

rather than a random sample to identify in effect the run of the mill mesothelioma claims, they have targeted people who got more than average compensation from Garlock to resolve their claims or who won verdicts, an even rarer subset because the trials were so few.

So far from a random sample that one could extrapolate from in a statistical way, they have targeted what they call the high value cases, and they have acknowledged in their own argument that those are precisely the cases where Garlock had the most incentive and exercised the most energy in pursuing discovery.

That is also, by the way, not simply Mr. Worf's arguments from the counsel table today but in note two their reply in support of the amended motion that we are now arguing. It says that these cases that they have targeted are, quote, also generally the cases where Garlock conducted the most discovery. So they are in the best position with respect to these past claimants to draw inferences based upon the discovery material already in hand. There is no indication that they have attempted to do that or that the attempt has shown that that information would be inadequate.

If, for example, they want to delve into their litigation files concerning these high-value claims and organize all of that material to demonstrate that, when Garlock settled those claims, it was not of record whether or not the

plaintiff had a claim against Johns-Manville, or Owens Corning or something like that, they can do that. They can do that without disturbing settled claimants or judgment holders out of the materials that they got in the tort system and of the kind that they routinely use for drawing inferences of that nature now through the Bates firm.

These claims are precisely the ones where the Turlick testimony about the data resources already available to Garlock is most significant. The need here is minimal, if at all, because of the way that they have targeted the particular claimants they want to – past claimants that they want to go after for more discovery.

Now, I spoke earlier of the un-wisdom of allowing the discovery process to focus inordinately on individual claims, and this is the textbook example because consider what would happen if they got this discovery and now predictively they would say, aha, this discovery proves that we are right, these people didn't make trust claims before we settled. By the way, where is it written that Garlock is entitled to wait until everyone else settles before it does or goes to trial? It isn't. It's an intellectual construct that they have set up that has no foundation in reality.

But they say, aha, these materials make our case. We will dispute it. The question will become, okay, what were the circumstances in which these five hundred cases were settled?

Who will be the witnesses to that? Presumably the lawyers who settled the cases and the Garrison people who were in the loop on settlement matters.

So they will have to bring in the settlement lawyer, the Mr. Glaspy of the particular case, and we will examine him about what was the situation existing right before they settled, what he knew and didn't know, how he knew it, to what extent he exercised diligence in trying to find out things about the claimant's other exposures or other defendants, and we will remind him of David Glaspy's testimony that, yes, indeed – and this was elicited by Mr. Cassada on direct – yes, indeed, when Garlock settled cases or went to trial, it had a very good educated guess – I think was the terminology he used – as to what the other settlements were because he had the institutional knowledge of the work sites; he had his savvy as a trial lawyer. He has his relationships with other members of the defense bar, and he had a pretty good working hypothesis of what those other settlements were.

And the lawyer who is being examined now notionally about why he settled a given case at a given level will be confronted with all of that and will give his story, and then we might have to bring in the plaintiff's lawyer to give the plaintiff's perspective on what the situation was existing at trial.

Your Honor, the Glaspy testimony I just referred to is

at page 33 at lines 11 through 15. It has to do in this instance with tried cases that he says before finishing the trial – I am sorry. The question was, at line eight:

"Q. And did you have an idea in cases about the amount of settlements that the plaintiff was receiving from other defendants?

A. Before finishing a trial, the answer to that question is, yeah, we had an idea or a very good educated estimate and we would obtain that by prior dealings, historical numbers and just talking with defense attorneys but it was a ballpark estimate."

I remind the court that we are here about an estimate, mathematical precision as the court in *Owens Corning* and the court in *Federal-Mogul* acknowledged, not the kind of estimate that Mr. Glaspy had when he sat down to settle cases is what – is, I think, the appropriate basis under which to assess the reasonableness of the historical settlements for the purposes of forecasting an estimation.

But in any event, the point now is, if we allow the estimation discovery to focus inordinately on individual settlements, we will have five hundred mini trials about the circumstances under which highly individualized past claims were resolved. It doesn't make any sense. It will consume inordinate amounts of time. It isn't worth the candle. But we will be forced to go there if Garlock is allowed to go to past

claimants in order to build a one-sided argument about the meaning of the past settlement data.

Again, Mr. Glaspy was clear in testifying that Garlock settled to avoid trial risk. He also had to – I am sorry – Garlock must acknowledge that the trust distribution procedures of the existing trusts, which are all public, show what those trusts are paying on average. So putting that together with information that is now going to get from the present claimants, who have a lot of controversies with Garlock, will provide pursuant to the questionnaire and that, coupled with Garlock's preexisting resources, which are formidable, should suffice.

Now, I want to be clear it is not our position that there are no circumstances under which a law firm can be subpoenaed for documents. We never said that. What we say is that, as a matter of the court's discretion under Rule 26 and for the purposes of shaping the estimation proceeding, it would not be a wise thing to do to open up past claimants in these numbers to this kind of discovery. There are good prudential reasons to avoid that can of worms. Those lawyers who formerly represented claimants who won substantial settlements from Garlock will predictively and undeniably regard efforts to take discovery of the very same claim, for the very same circumstances, as Garlock had the opportunity to take in the tort system before it settled, is at the very least in

derogation of the settlement and in effect a diminution of the value of the settlement to the claimant. And they will do what strong lawyers are supposed to do in defending their client's interest, and that is they will litigate the appropriateness of it. And while we are struggling to get traction in an aggregate estimation that could finish up sometime before the end of this year, all of a sudden we will have a proliferation of enforcement disputes. This isn't a threat. Whenever I say this, they tend to say that I am somehow threatening them. I am just trying to predict the course of events in a way that can inform the judicial management of this case.

This discovery isn't worth that price and yet it will put these thirty law firms that they have chosen to target with this discovery in the position of almost having to do that, almost being compelled to put up a stout defense of this discovery in their own courts and haggle through all of those Rule 45 issues while the parties in this case are trying to get to the aggregate estimate.

I can't control that process. I can only give the court my best forecast of what disputes will flow from this ill-considered effort by the debtors to disturb claimants whom they voluntarily settled with under circumstances where either they did get the discovery that they are now after so it's redundant or they found it not to be to their advantage to seek it. In which case, now they are trying to retread. Neither

scenario is an attractive one from the standpoint of trying to justify this unusual discovery.

A couple of hypotheticals. These are not intended to answer comprehensively but to point out aspects of what makes this discovery troublesome.

Suppose in the tort system Garlock is defending a mesothelioma suit brought by plaintiff "A." Now Garlock subpoenas former plaintiff "B," a settled claimant, demanding discovery of that former claimant's claims against not Garlock but other defendants and the status of those cases and there is an objection and Garlock argues I need that information from the settling claimant concerning his claims against others and those resolutions, third-party against third-party, to determine whether to settle with plaintiff "A" and, if so, at what amount. That would not be a viable justification for that unusual discovery in the tort system.

That doesn't necessarily dictate the answer here but it is informative. There is a radical disconnect between the stated purpose and what that discovery could actually show and there are good, solid reasons in the meaning of settlements, in the importance of finality in the litigation system and in the sound judicial administration of Garlock's own case not to go there.

Now suppose in a variation of the hypothetical, the same facts but the co-defendants about whose claims Garlock

would inquire of the former claimant have put on the Internet their average payments to mesothelioma claimants. That is precisely the situation of the trusts who, after all, are nothing but in effect the liability divisions or run-off divisions of reorganized former co-defendants.

What in the world could justify the foray into this unusual discovery against resolved claims when the average that the targeted co-defendant or former co-defendant pays to claimants of that type is already known?

It reminds me again of Judge Fullam's admonition, "Let us begin with what is known." Let's not go chasing after mathematical precision. Let's not make the aggregate estimation inordinately focused on highly individual claim by claim inquiries.

Now, after the same hypothetical that plaintiff "A," the active litigant against Garlock in the tort suit, will have disclosed the fact and status of his claims against the co-defendants, which is what claimant "A" will have to do under the questionnaire. It becomes more and more marginal. It is ultimately reduced to abject absurdity.

We have said some things in our papers about ulterior purposes that the plaintiffs bar will certainly suspect, given Garlock's public posture, and that will intensify the onset of satellite litigation if these matters go forward, and that is Garlock's declared purpose of sometime in the fullness of time

bringing lawsuits against lawyers who settled cases in a way that Garlock now regrets were against their clients. We know that when a lift stay applicant came to court this last fall and Garlock responded by a blunderbuss of discovery, even though that lift stay applicant held a judgment against Garlock, you found no connection between the lift stay and the discovery. Garlock said in parting, "Oh, well, we will get that discovery when we bring our past claimants motion." They were suggesting in that situation that that claimant had somehow wronged them by coming out on the winning side of that case in the way that claimant did, and they were eager to develop a factual basis for some kind of striking back.

Well, that is an avowed purpose, not even a disguised ulterior purpose of some of this discovery. Those purposes, at the very least, coexist with the arguments that Mr. Worf has made. They suggest a very troublesome tendency here and one that won't be lost on the people who receive these subpoenas. They are all well aware of Garlock's aggressive posture. And so that adds to the discretionary factors that we hope you will take into consideration in weighing the balance here because it makes it highly probable that this discovery will be seen as a provocation that will produce a lot of litigation that will get the estimation off track, which is something I am hoping to prevent.

And so, Your Honor, for all of these reasons, all of

which are inherent in Rule 26(b)(2)(C), we hope you will exercise your discretion and deny this motion.

Thank you, Judge.

THE COURT: I think I have to deny this motion for the law firms for the same reasons that I have done before, but also I think that largely on relevance grounds that it seems to me unlikely that, if this evidence was produced, that it would really go very far towards doing what the defendants/debtor suggests that it would and, that being the case, it is an unwarranted expense and an undue burden to proceed in this way to try to get that evidence, given the fact that these are settled claims that are anywhere from almost a year to ten years old, you know, claims that have been put to rest and I think ought to stay at rest.

So, Mr. Swett, if you all will just draw an order denying that motion, we will go from there. Okay.

Does that do then what we had set to do for today or is there anything else?

MR. CASSADA: That completes the agenda today.

THE COURT: Okay.

COURTROOM DEPUTY: The motion of the asbestos personnel injury claimants is still pending, motion of the official committee, number three on the agenda.

MR. SWETT: The judge dealt with that in the status conference.

THE COURT: Yeah, in the status matters, yeah. Okay. Well, thank you all for your efforts and we will – when is our next hearing?

MR. MILLER: The 26th.

THE COURT: All right. We will see you all then. If you need, on the questionnaire, if you need to get up with me or if you need to have a status conference or something to work out any final details of that, just call and I will be around and about, one place or another, and we can get together by conference call or otherwise.

MR. KRISKO: Thank you, Your Honor. We will try to get that to you quickly.

COURTROOM DEPUTY: And the exhibits from today's hearing?

THE COURT: We will admit all the exhibits. Anything that was new, I will admit.

Thank you.

(Off the record at 4:19 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Patricia Basham

Patricia Basham, Transcriber

Date: May 21, 2011